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Some Benefits and Risks of Privatization of Justice Through ADR

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INTRODUCTION

During the course of the last quarter of the century, many have posited a need to develop approaches to resolving disputes that avoid full traditional litigation. Privatization of dispute resolution is among the suggested routes.

A number of concerns underlie the alternative dispute resolution-privatization effort: (1) anxiety over a so-called "litigation explosion" that some say is clogging our courts; (2) a general sense that even though there are too many lawyers and too much law, the average person and many commercial enterprises are left out of the system and cannot get help at a reasonable cost when and how it is needed; (3) a consensus that traditional court processes often unnecessarily exacerbate hostility; and (4) proliferation of new types of litigation such as many types of discrimination cases and mass tort class actions often involving hundreds of thousands of plaintiffs, multiple defendants, and difficult problems of science.

In some areas, with the approval and encouragement of government and other policy-making bodies, the business of justice is being encouraged to leave the courts for alternative forums. This privatization of dispute resolution must be considered in the context of our fundamental public commitment to provide substantive justice on an equal basis to all people. We must not close the courthouse door to those who need the courts' protections. More justice, better administered, is what both proponents of new and old forms should seek.

Absorption of Alternative Dispute Resolution into public and private institutions is pervasive.¹ ADR has been incorporated into court procedures (and more inclusion is urged),² government contracts,³ contracts between

¹ See generally Edward A. Dauer, *Manual of Dispute Resolution, ADR Law and Practice* (1994); William K. Slate II, *Arbitration Comes of Age*, AM. LAW., May 1995, at 8 (pervasiveness of ADR); Judith Resnik, *Rereading "The Federal Courts": Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021, 1051-52 (1994) (competition between private dispute resolution forums and federal courts for cases); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, OHIO ST. J. ON DISP. RESOL. 2 (1995); *HNRP Launching New Fellowship Program in Law and Negotiation*, NEGOTIATION HARV. LAW SCHOOL NEWSLETTER, Fall-Winter 1995-1996, at 1, 5.

² See Civil Justice Reform Act of 1990, 28 U.S.C. § 473(a)(6) (1990) (directing courts to consider authorizing referral of "appropriate cases to alternative dispute resolution programs"); 28 U.S.C. § 473(b) (4)-(5) (neutral evaluation programs and settlement conferences); UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, *DISPUTE RESOLUTION PROCEDURES IN THE EASTERN DISTRICT OF NEW YORK* (1992) (describing several programs—arbitration, early neutral evaluation, mediation, trial before

magistrate judges, settlement conference and appointment of special masters—available in the Eastern District); Edward F. Sherman, *A Process Model and Agenda for Civil Justice Reforms in the States*, 46 STAN. L. REV. 1553, 1570 (1994) (more use of alternatives to trial); Michael L. Seigel, *Pragmatism Applied: Imagining a Solution to the Problem of Court Congestion*, 22 HOFSTRA L. REV. 567 (1994) (less than full trials).

See generally *Symposium on Civil Justice Reform*, 46 STAN L. REV. 1285 (1994); JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 88 (1995) [hereinafter WEINSTEIN, *INDIVIDUAL JUSTICE*]; Donna Stienstra & Thomas E. Willging, *Alternatives to Litigation: Do They Have A Place in the Federal District Courts?* (Federal Judicial Center 1995) [hereinafter Stienstra & Willging, *Alternatives*]; CENTER FOR PUBLIC RESOURCES, *JUDGE'S DESKBOOK ON COURT ADR* (Elizabeth Plapinger et al. eds., 1993) [hereinafter JUDGE'S DESKBOOK]; *Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Survey of United States Judges* (Federal Judicial Center 1994); David Krafka & Carol Krafka, *Voluntary Arbitration in Eight Federal District Courts: An Evaluation* (Federal Judicial Center 1994); Barbara S. Meyerhofer, *Court-Annexed Arbitration in Ten District Courts* (Federal Judicial Center 1990); State Justice Institute, National Center for State Courts, National Symposium on Court-Connected Dispute Resolution Research (Susan Keilitz ed., 1994); National ADR Institute for Federal Judges, Transcript (Harv. L. Sch. Nov. 12-13, 1993); CPR Inst. for Disp. Resol., ELIZABETH PLAPINGER & MARGARET SHAW, *COURT ADR, ELEMENTS OF DESIGN* (1992); SECTION OF DISPUTE RESOLUTION, PUBLIC SERVICES DIVISION, GOVERNMENTAL AFFAIRS GROUP, 1993 DISPUTE RESOLUTION PROGRAM DIRECTORY; ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, *RESOURCE PAPERS IN ADMINISTRATIVE LAW, MEDIATION: A PRIMER FOR FEDERAL AGENCIES* (1994); THE RIGHT HONOURABLE THE LORD WOOLF, *ACCESS TO JUSTICE* (1995) [hereinafter WOOLF REPORT]; THOMAS R. COLOSI & CHRISTOPHER B. COLOSI, Fed. Cts. Study Committee, REP. OF THE FED. CTS. STUDY COMMITTEE 57-64 (1990); Jack B. Weinstein, *Warning: Alternative Dispute Resolution May Be Dangerous to Your Health*, LITIG., Spring 1986, at 5 [hereinafter Weinstein, *Warning*]; Jack B. Weinstein, *The Lesson of Mass Tort Litigation in the United States: The Need for Consistency and Cooperation in the Utilization of Scientific Evidence by the Courts*, THE FORUM FOR US-EC LEGAL-ECONOMIC AFFAIRS, THE MENTOR GROUP, LONDON, Sept. 19, 1995 [hereinafter *Lesson*].

See also, e.g., COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, *PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS* (2d prmtg. 1995) [hereinafter *PROPOSED LONG RANGE PLAN*]. But cf. Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889 (1991).

³ See the Administrative Dispute Resolution Act of 1990, Pub. L. No. 101-552, 104 Stat. 2736 (codified as amended in scattered sections of 5 U.S.C., 9 U.S.C. § 10, 28 U.S.C. § 2672, 29 U.S.C. § 173, 31 U.S.C. § 3711, and 41 U.S.C. §§ 605, 607) (directing federal agencies to "adopt a policy that addresses the use of alternative means of dispute resolution and case management" in connection with "(A) formal and informal adjudications; (B) rulemakings; (C) enforcement actions; (D) issuing and revoking licenses or permits; (E) contract administration; (F) litigation brought by or against the agency; and (G) other agency

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individuals and businesses,⁴ contracts between businesses and businesses,⁵ and statutorily mandated relationships.⁶ One senior partner at a major New York law firm estimates that he spends almost half his time mediating disputes—as a special master to the courts or by request from attorneys involved in litigation.⁷ Much of the other half is spent using ADR techniques to develop settlements for his own clients.⁸ Law firms interested in exploring settlement are increasingly resorting to ADR on their own initiative—for example, by arranging privately choreographed “mini-trials” at which both sides present arguments and evidence to the CEOs of the disputing companies, even as litigation is pending in a traditional forum.⁹

Ethical rules are being developed to govern arbitrators’ activities.¹⁰

actions”). Agencies are directed not to use ADR (1) where there is a need for precedential value; (2) in certain situations involving “significant questions of Government policy”; (3) where “the matter significantly affects persons . . . who are not parties to the proceeding”; (4) where a “full public record is . . . important”; or in certain other situations. 5 U.S.C. § 572. The Act’s sunset provision terminates the authority granted under the statute on October 1, 1995.

With the Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (codified as amended at 5 U.S.C. §§ 581-90), Congress authorized agencies to engage in “negotiated,” as opposed to “adversarial,” rulemaking when the head of the agency determines it is in the public interest. On ADR in the administrative agencies, see generally THOMAS R. COLOSI & CHRISTOPHER B. COLOSI, *MEDIATION: A PRIMER FOR FEDERAL AGENCIES* (1993).

⁴ See *infra* Part III.A (securities cases).

⁵ See discussions *infra* Part V.C.

⁶ See, e.g., the Railway Labor Act, 45 U.S.C. § 151 (1994); *Felt v. Atchison, T. & S.F. Ry. Co.* 60 F.3d 1416 (9th Cir. 1995) (construing RLA’s mandatory arbitration provisions governing “minor” disputes).

⁷ Interview with Edwin J. Wesely, Senior Litigating Partner, Winthrop, Stimson, Putnam & Roberts, in Brooklyn, N.Y. (Mar. 23, 1995).

⁸ *Id.*

⁹ *Id.* A number of for-profit businesses will assist law firms in setting up simulated trials, complete with mock juries and one or more neutral decisionmakers. See, e.g., *DECISION RESEARCH BROCHURE OF DECISION RESEARCH* (Lexington, Massachusetts 1995) (describing preparation of jury trial simulation, and other techniques, available as part of consulting firm’s litigation services) (on file with author). In many instances, a law firm will arrange to do the simulation internally, without participation from the other side, and use the results in counseling their clients on the desirability of pursuing settlement or going to trial. Telephone interview with Ann Laaff, Principal, Decision Research, Lexington, Mass. (Mar. 28, 1995).

¹⁰ See *Code for Mediators is Gaining Approval*, *DISPUTE RESOLUTION TIMES*, Fall 1994, at 8 (“Proposed Standards of Conduct for Mediators have been approved by the

Case law assures the immunity of court-appointed administrators and neutral evaluators for actions taken within the scope of their official duties.¹¹ The immunity of others, particularly special masters, is not clear.¹²

Courts are not only capable of meeting many of society's dispute-resolution demands, they remain the preferred fora for doing so in many cases. In theory, if not always in practice, everyone is equal in the courts; mechanisms exist to help redress imbalances and protect against manifest injustice. Such a commitment is absent from many forms of private, extrajudicial dispute resolution. Some forms even seem cynically designed to exploit information and resource imbalances between the parties.¹³

Widespread privatization of dispute resolution has the potential to stunt the common law's development as entire areas of law are removed from the courts; deprive the public of important information, such as news of a product's harmful effects; deny plaintiffs the therapeutic benefit of having their "day in court;" degrade constitutional guarantees of the right to a jury trial; and prevent public debate and consensus-building in cases with national public policy implications.¹⁴

American Arbitration Association (AAA) and the Society of Professionals in Dispute Resolution (SPIDR)."); Carrie Menkel-Meadow, *Professional Responsibility for Third-Party Neutrals*, ALTERNATIVES TO THE HIGH COSTS OF LITIGATION, Sept. 1993, reprinted in JUDGE'S DESKBOOK, *supra* note 2, at 87, 89.

¹¹ See, e.g., *Wagshal v. Foster*, 28 F.3d 1249, 1252 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 1314 (1995).

¹² See, e.g., *Atkinson-Baker & Assoc. Inc. v. Kolts*, 7 F.3d 1452, 1454-55 (9th Cir. 1993) (absolute quasi-judicial immunity extended to special masters appointed by district court judges); *Church of Scientology Int'l v. Kolts*, 846 F. Supp. 873 (C.D. Cal. 1994) (same); *Boston v. Lafayette County, Miss.*, 744 F. Supp. 746 (N.D. Miss. 1990), *aff'd*, 933 F.2d 1003 (5th Cir. 1991) (same). On the potential liability of special masters, see generally Margaret G. Farrell, *Coping with Scientific Evidence: The Use of Special Masters*, 43 EMORY L.J. 927, 981-82 (1994) (discussing potential liability of special masters, even assuming judicial immunity for their juridical and administrative actions); Margaret G. Farrell, *The Role of Special Masters in Federal Litigation*, 842 A.L.I.-A.B.A. COURSE OF STUDY 931, 961-62 (1993) (same).

¹³ See discussion *infra* Part III.A (securities cases).

¹⁴ On the drawbacks of ADR, see, e.g., Stienstra & Willging, *Alternatives*, *supra* note 2, at 14-16 (pros and cons); Janice A. Roehl, *Private Dispute Resolution*, in COURT REFORM IMPLICATIONS OF DISPUTE RESOLUTION 128, 133 (Conference Proceedings for the Ohio State University College of Law 1995); Robert L. Haig & Steven P. Caley, *How Clients Can Use Federal Court ADR Methods to Achieve Better Results*, 5 FED. LITIG. GUIDE REP. 193, 194 (1994); Weinstein, *Warning*, *supra* note 2, at 5. See also, e.g., Harold Brown, *Antitrust in Arbitration*, N.Y. L.J., Sept. 28, 1995, at 3 (discussing the split in cases where the public policy in favor of arbitration may dilute the antitrust policy).

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We should proceed cautiously in replacing our courts with alternative fora. Extrajudicial dispute resolution should often be a supplement to, not a substitute for, court-based adjudication. Its availability should not replace required procedural and substantive reform if the courts are to be able to handle properly those cases before them.

The term "alternative dispute resolution" has been used to refer both to procedures and to institutional structures for dispute resolution. In its forum sense, it invokes the panoply of dispute resolution institutions that do not involve the courts, including intra-industry treaties to arbitrate disputes, administrative agency ombudsperson services, contractual agreements to arbitrate disputes, and others. In its procedural sense, it invokes dispute resolution tactics that depart from the litigation norm—mediation, summary jury trials, mini-trials, judicial referral of cases to magistrate judges and settlement masters—whether employed by the courts or by extrajudicial dispute resolution bodies.

ADR refers to a variety of techniques, each implicating different levels of privatization. First, there is the panoply of private ADR methods. By preagreement, as through contract provisions or through industry-wide treaties and regulations, the parties agree to resolve future disputes according to arbitration or some other ADR method. The court may only become involved if asked to enforce the agreement or arbitrator's decision. Second, there is court-annexed ADR, which typically consists of mediation, arbitration, or early neutral evaluation. In some districts, it may also include the use of "summary jury trials" and "mini-trials." Third, there are a variety of techniques that judges use in handling cases without full dress litigations. Our goal in developing adjuncts to our courts and new procedures in courts is to improve the functioning of society's entire complex peaceful dispute resolution system.

This article is mainly concerned with "alternative dispute resolution" in its forum sense. Parts I and III the historic and ongoing importance of the courts as public centralized dispute-resolution forums in our modern democratic and pluralistic society. Part II discusses the threat posed by some forms of privatization of justice to substantive values protected and given effect by the courts. Part IV discusses some of the rationales proposed for supporting increased privatization of justice, questions some misperceptions about traditional adjudication that underlie the arguments favoring privatization, and suggests ways in which the court system can better meet modern demands. Part V identifies some areas appropriate for extrajudicial dispute resolution. Part VI touches on some implications for criminal cases.

I. THE IMPORTANCE OF CENTRALIZED, PUBLIC LAWMAKING

Privatized dispute resolution may be viewed as the latest element in a

series of initiatives designed to limit the availability of a centralized public forum for airing and resolving grievances. Yet,

[a] hallmark of our system of democratic government has been that private individuals, including the disadvantaged or less powerful segments of our society, have access to the political and legal processes, and that governmental decisionmaking is open to public scrutiny.¹⁵

Before permitting traditional court functions to be supplanted by private dispute resolution approaches, it is useful to reflect on the central role of the courts in society's dispute resolution system of the past and the reasons for preserving that centrality in the future.

A. Establishing Norms of Behavior

The courts' functioning must be put in a social context, as part of a web of institutions that enable people to live together peaceably. We have learned to see legal institutions as part of a larger ecology in which various dispute institutions interact and effect one another. As these interconnections become common knowledge, those who would design or justify legal institutions must accept responsibility not only for the small world of adjudication, but for the larger world of disputing and bargaining in which it is set.¹⁶

One theorist has explained that the law serves two functions: to

¹⁵ LAW AND PUBLIC POLICY COMMITTEE OF THE SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, PUBLIC ENCOURAGEMENT OF PRIVATE DISPUTE RESOLUTION: IMPLICATIONS, ISSUES AND RECOMMENDATIONS (1993), reprinted in JUDGE'S DESKBOOK, *supra* note 2, at 87.

¹⁶ Marc Galanter, *Compared to What? Assessing the Quality of Dispute Processing*, 66 DENV. U. L. REV. xi, xi (1989); see also Marc Galanter & Mia Cahill, "Most Cases Settle": Judicial Promotion and Regulation of Settlements, 46 STAN. L. REV. 1339 (1994). Galanter and Cahill explain:

[C]ourts (and other dispute resolvers) do more than resolve disputes; they broadcast messages to various audiences about the conduct of disputes and about the norms of conduct underlying those disputes. . . . In addition to the effects on the actors involved in a dispute, there may be other effects on wider audiences through communication of information about the dispute (and about responses to that information). . . . Every case has possible general effects—for example, as a deterrent for future actors or as precedent for future decisionmakers. Patterns of practice as well as individual instances may have general effects.

Id. at 1379.

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influence behavior in accordance with established norms of what is acceptable behavior and to provide standards of enforcement for the bureaucratic state.¹⁷

For law to serve its function as giving expression to enforceable behavioral norms, it must be made publicly for all to see. This is true both of substantive lawmaking through common law development and of adjudication in individual cases.

Principled decisions are reasoned and public. As such they become known, feed expectations, and breed a common understanding of the legal culture of the country, to which in turn they are responsive and responsible. The courts are not formally accountable to anyone, but they are the most public of governmental institutions. They are constantly in the public gaze, and subject to public criticism. Thus their decisions both mould the public culture by which they are judged and are responsive to it. . . . It is a requirement for justification by reference to the common values and shared practices of the legal culture.¹⁸

Members of the public must know what the law is if they are to predict the probable outcomes for acting a certain way, and modify their behavior accordingly.¹⁹

The need for public law-making and enforcement is especially important in a pluralistic society. In a homogenous society, the norms given effect by the law are generally community norms.²⁰ A basic familiarity with the principles, if not specific proscriptions and admonitions, can be assumed. Custom and formal law, intertwined, can be counted on to normalize an individual's behavior.

In a pluralistic society, people cannot be presumed to be familiar with any one system of norms merely by virtue of their membership in that society. Each sub-community has its own value system.²¹ While there are

¹⁷ David M. Engel, *Legal Pluralism in an American Community: Perspectives on Civil Trial Court*, 1980 AM. B. FOUND RES. J. 425.; see also Galanter & Cahill, *supra* note 16, at 1379 (distinguishing between law's "specific effects" (effects on the parties) and its "general effects" (effects on a larger audience)).

¹⁸ See JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 358-59 (1994) (describing "bureaucratic" and "community" law models).

¹⁹ *Id.* at 355.

²⁰ Cf. Susan S. Silbey & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject*, 66 DENV. U. L. REV. 37, 464-66 (1989) (discussing relationship between the formal legal system and cultural norms) (citing Engel, *supra* note 17)

²¹ See, e.g., Elizabeth Kolbert, *Americans Despair of Popular Culture*, N.Y. TIMES,

substantial overlaps in the values of individual communities, those imbrications may be "insufficient to provide a common understanding of the justice of various ways of organizing family life and other personal relations" and of the reasonableness of the economic structure of the state and its civil liberties.²²

This problem of divergent community ideologies was revealed dramatically in the recent revelations about the oppressive conditions under which illegal Thai immigrants labored in a California sweatshop.²³ Most Americans, who are accustomed to workplace regulations and wage and hour laws in particular, intuitively know that such conditions are illegal.²⁴ Those responsible for the sweatshop, news articles suggested, may not have sought to violate the law so much as to replicate conditions commonplace in their country of origin.²⁵

B. Public Law Making in a Participatory Democracy

In a representative democracy such as ours, the people must know when the law is changing—whether through the initiative of legislators or judges—so that they can protest innovations they find objectionable. Since our social customs, economic organizations, and technology are changing, the law must be modified appropriately to meet these new conditions. What

Aug. 20, 1995, at B1.

²² Raz, *supra* note 18, at 357.

²³ Kenneth B. Noble, *Thai Workers are Set Free in California*, N.Y. TIMES, Aug. 4, 1995, at A1.

²⁴ But see recent reports of terrible conditions in migrant labor camps in the South. Manuela Fernandes, *Medical Woes Trail Migrants; Georgia Program Gives Some Basic Care to Seasonal Workers*, ATLANTA JOURNAL, July 19, 1995 at 3C (describing severe health, environmental, and working conditions in migrant labor camps); John Lantigua, *Migrants' Lives Filled With Fear and Crime*, MIAMI HERALD, Apr. 5, 1994 at B2 (describing vulnerability of Florida migrant labor camps to crime).

²⁵ See Kenneth B. Noble, *Los Angeles Sweatshops are Thriving, Experts Say*, N.Y. TIMES, Aug. 5, 1995, at A6. Jack Kyser, chief economist of the Economic Development Corporation of Los Angeles, explained:

A lot of times you get people coming from offshore and setting up these shops, because it's a very easy industry to get into and you don't need a lot of capital . . . But in many cases they don't understand all the rules and regulations they have to comply with and all the forms they have to fill out. . . . They're probably doing business like they did it in the country of their origin, but in the United States, they're breaking the law.

Id.

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this new law should be, and how society should react, is a fit subject for public debate.

C. Public Forums and Public Security

Public lawmaking is integral to how our society maintains a healthy collective psychology and sense of security. A criminal act may hurt only one person directly, but its prosecution by the state reflects the entire community's sense of vulnerability, hurt, and outrage.²⁶ Similarly, the negligent act by a defendant in a civil product liability suit may indirectly touch many who never used the particular product, but who may become wary of an entire industry because of a particular defendant's act.²⁷ The public wants the reassurance that the state will protect them provided by an open process. In our current environment, protection of the public through both administrative agency control of dangerous products, and compensation through a health and security system, sometimes offer a better alternative to the traditional court system.²⁸ This is not, however, what its opponents think of as ADR.

D. Public Forums and the Process of Healing

A public forum may also be important to the individual litigant. There is a therapeutic effect in public grieving of disputes.²⁹

II. THE CHANGING NATURE OF DISPUTES IN OUR MODERN, MULTICULTURAL SOCIETY

As society becomes more complex, so too do its ever-growing disputes. This process is reflected in our cases.³⁰

²⁶ KENT GREENAWALT, PUNISHMENT (1982); *United States v. Smith*, 893 F. Supp. 187 (E.D.N.Y. 1995) (victim's statement and interest of groups affected in punishment).

²⁷ D.M. BURLEY ET AL., PRODUCT LIABILITY INSURANCE AND THE PHARMACEUTICAL INDUSTRY: AN ANGLO-AMERICAN COMPARISON (Geraint G. Howells ed., 1991).

²⁸ WEINSTEIN, INDIVIDUAL JUSTICE, *supra* note 2, at 163.

²⁹ *But see* Galanter & Cahill, *supra* note 16, at 1378 (discussing "personal transformation" of parties through settlement process); Sara D. Schotland, *Mediation and Arbitration of Product Liability Cases*, PROD. SAFETY & LIAB. REP. (BNA) No. 28, July 21, 1995, at 752 (asserting that "[t]he 'therapeutic' aspects of mediation should not be overlooked. Plaintiff may welcome the chance to tell his or her side of the story and express feelings of suffering or anger.").

³⁰ WEINSTEIN, *supra* note 2, at 16 ff.

A. Increasing Complexity of Litigation

We are seeing a change in the nature of the cases in the courts. Consider the typical "mass tort," which may involve millions of plaintiffs, dozens of defendants, difficult scientific problems, and seemingly insurmountable choice-of-law problems.³¹ Mass tort litigations, such as those involving toxic torts that we have seen in the Eastern District of New York—for example, DES, asbestos, and Agent Orange—challenge old ways of resolving disputes.

The development of mass tort litigation was an inevitable consequence of the nationalization of commerce. We no longer live in a world of local manufacturers piecing together products made from local raw materials for a local community. Consumers are as apt to pick up a telephone, with credit card in hand, and order a product from a state halfway across the country, as they are to walk to the corner store. Products are developed for a national or international market. Raw materials or parts may come from one country, subassembly and final assembly may be performed in others, and the finished product may be sold in yet another.³² Each step of the process creates new litigation possibilities.

With the development of an international economy, the harm caused by a defective product increasingly will affect the lives of people spread across the country and the globe. We see this with the breast implants cases, where the equitable treatment of non-United States claimants was a substantial obstacle to settlement.³³ The international community will have to mobilize to ensure that claimants are treated fairly across geographical boundaries, just as it has mobilized to address trade, health, environmental, and other problems.³⁴

³¹ See *In re Joint E. & S. Dist. Asbestos Litig.*, 878 F. Supp. 473, 540-42 (E. & S.D.N.Y. 1995) (describing the substantive choice-of-law problem).

³² Byron Acohido, *Expansion Express—Airlines, Air-Freight Companies Enter High Stakes Arena of Global Delivery*, SEATTLE TIMES, June 3, 1990, at E1.

³³ Michael Unger, *Implant Deal Splits Foreign, U.S. Women*, N.Y. NEWSDAY, Aug. 20, 1994, at A15 (consideration of defendants' motions to dismiss foreign plaintiffs' claims on grounds of forum non conveniens, and more generally of the problems of foreign plaintiffs in securing compensation for their injuries); see *In re Silicone Gel Breast Implant Prod. Liability Litig.*, 887 F. Supp. 1463 (N.D. Ala. 1995).

³⁴ Weinstein, *Lesson*, *supra* note 2. Many ADR insights can be applied to the area of mass torts. See *Task Force [of AAA] to Study Mass Torts*, DISPUTE RESOLUTION TIMES, ADR NEWS FROM THE AMERICAN ARBITRATION ASSOCIATION, Winter 1995/96, at 1; *ADR is the Key to Class Action Settlement*, ALTERNATIVES TO THE HIGH COST OF LITIGATION, Jan. 19, 1996, at 1 (CPR Institute for Dispute Resolution); Deborah R. Hensler, *A Glass Half Full, A*

B. Increasing Reliance on the Courts Due to Loss of Community

New litigation has also resulted from the breakdown of families, communities, neighborhoods, and ethnic, cultural, and religious institutions as stabilizing social forces in society.³⁵ Professor Marc Galanter has identified what he calls "indigenous forums"—hospitals, schools, condominiums, churches, and others—that operate by reference to "codes of conduct" independent of, although probably overlapping with, the law.³⁶ The attraction of the courts as dispute resolvers may be inversely proportional to the strength of such institutions. When these institutions fail, and when the social and ethical pressures which they bring to bear are insufficient to mollify the parties, the courts remain to provide the certainty of a resolution of some sort.

The law that used to control everyday life was an amalgam of religious and moral precepts, painted with a broad brush and enforced almost exclusively through community control.³⁷ In a world of closely-knit communities, in which everyone knew what everyone else was up to, this kind of pressure was surprisingly effective. The rule "do unto others as you would have them do unto you" is no mere abstraction when those "others" live in close quarters and see you every day.

Today, families are widely scattered across the country. They are often embattled with alcoholism, divorce, and abuse of spouses, children, and the aged. We no longer know the people who grow our food or make the products we use. Small neighborhood shops have all but disappeared in most places. The communities existing sixty years ago, in which the law functioned—and which helped enforce the law—have largely vanished, except among a relatively few groups.

Few of our people experience community in that way in modern times. An exception are the fundamentalist communities—Jewish, Christian, and Muslim—in which the word of God is enforced, as literally as possible, through strict peer pressure.³⁸ For most of us, fundamentalism is not an

Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation, 73 TEX. L. REV. 1587 (1995).

³⁵ See Elizabeth Shogren, *Traditional Family Nearly the Exception, Census Finds*, L.A. TIMES, Aug. 30, 1994, at A1 (analyzing census data showing demise of the "traditional" two-parent family).

³⁶ See Galanter, *supra* note 16, at xiii.

³⁷ See Ya'akov Habba, *Compromise in Jewish Law*, JUSTICE (International Association of Jewish Lawyers and Jurists, Tel Aviv, Israel), May 5, 1995, at 40.

³⁸ See Randy Kennedy, *Jews and Muslims Share a Piece of Brooklyn*, N.Y. TIMES, Aug. 17, 1995, at A1 (describing Brooklyn neighborhood in which Orthodox Jews and

option we choose to embrace. In our world neither religious law nor community pressure regulates most behavior.

Without strong communities, or strict adherence to religious law, the legal system must be all things to all people.³⁹ Increasingly, we depend on the secular legal system to tell us how to live. Today, even children have to be aware of the law, because it controls so much of what they do. Enforcement of behavior comes increasingly from the courts, rather than from religion, the family, or the community:

[W]e are connected to each other in the nature of the claims we make against each other: we do not ordinarily resort to self-help or depend upon various informal social groups like churches, families, or friends to take up our cause. Instead, we invoke our system of law, both because we have come to have faith in it and because we have largely abandoned other alternatives. American "community," consequently, now means only our ingrained expectation of official non-arbitrariness.⁴⁰

Although the law can do much in a democratic country such as ours, community and individuals bear a heavy responsibility for preserving harmony. Community is essential for enforcing civilized behavior. An encouraging trend is the proliferation of community-based dispute resolution facilities⁴¹ that help counter "a culture of adversarial legalism."⁴²

observant Muslims are discovering common ground in their different forms of devout religious observation and community life).

³⁹ See Timothy P. Terrell & James H. Wildman, *Rethinking "Professionalism,"* 41 EMORY L.J. 403, 422 (1992). Terrell and Wildman note:

[T]he legal system embodies our last remaining vestige of a sense of "community"—of shared values and expectations. All the other dimensions of our lives—race, religion, education, the arts, regional loyalty, and so on—divide us as much as they join us together because they are based on matters of "substance" on which we so often disagree.

Id.

⁴⁰ *Id.* at 423.

⁴¹ See 1993 DISPUTE RESOLUTION PROGRAM DIRECTORY, SECTION OF DISPUTE RESOLUTION OF THE PUBLIC SERVICES DIVISION GOVERNMENTAL AFFAIRS GROUP, AMERICAN BAR ASSOCIATION (302-page book listing hundred of facilities across the country); CONCILIATION & ALTERNATIVE DISPUTE RESOLUTION (Bar Association of Nassau County) (1995) (brochure for bar associations dispute-resolution program).

⁴² See Lawrence M. Friedman & Harry W. Schreiber, *Legal Cultures and the Legal Profession*, BULL. AM. ACAD. ARTS & SCI., Feb. 1995, at 6, 7.

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That said, we must reckon with the intense involvement of civil law in our everyday lives.

Not all disputes that appear to be individual or personal should be resolved locally. Some "personal" disputes implicate national policy. The decision to leave them to local community resolution has political overtones.

Reflect on domestic violence. Historically viewed as a private matter between a husband and wife,⁴³ in recent years it has been recast as a kind of social pathogen requiring national policymaking.⁴⁴ Individual cases, however, still pit two concerns against each other: on the one side, preserving the autonomy of the family unit and personal privacy; on the other, preventing the abuses that may be perpetuated when society looks the other way.⁴⁵ Notwithstanding the developing national consensus decrying violence in the home, some police remain reluctant in individual cases to intervene in husband-wife disputes.⁴⁶

A recent case from the Second Circuit, *Eagelston v. Guido*,⁴⁷ illustrates the political aspects of the determination of what type of forum is the proper dispute resolution facility. A woman asserted that the police department's preference for mediation in favor of arrests in domestic violence cases violated the equal protection clause by treating some victims differently from others. The federal appeals court rejected her claim:

A community may decide that mediation makes more sense, or is more promising, in disputes between members of the same family, or between neighbors, than in disputes between strangers, or that Family Court or counseling is a useful alternative to the criminal courts in certain

⁴³ See Catharine A. MacKinnon, Essay, *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN'S L.J. 59 (1993) (men's "private acts" against women left out of human rights analysis).

⁴⁴ See generally The Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1796 §§ 40001-40703 (1994).

⁴⁵ See Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1187 (1994) (failure of liberalism to account for women's experience of inequality through perpetuation of the public/private distinction); Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 115 (1993) (definition of spheres as "private" intended to prevent public intervention, leading to perpetuation of abuse); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1307 (1991) (need to consider sexual assault a "public" concern).

⁴⁶ See, e.g., *Eagelston v. Guido*, 41 F.3d 865 (2d Cir. 1994), cert. denied, 116 S. Ct. 53 (1995) (equal protection claim alleged on basis of police policy favoring mediation over arrest in domestic violence cases).

⁴⁷ *Id.*

situations. These considerations may impact arrest statistics without violating the equal protection clause.⁴⁸

C. Multiculturalism, New Rights, New Litigation

Another source of new litigation is increased sensitivity to social injustice, and the attendant creation of legally enforceable rights intended to assist the previously disenfranchised. Consider the example just described of our decision, as a society, to treat domestic violence as a matter of national concern. Once it was established that women have a right not to be battered, the courts become a natural forum for enforcing those rights. If society intervenes in a domestic dispute by arresting the spouse, it is the spouse who may go through the court system as a criminal litigant. If society fails to intervene, then it is the plaintiff who goes through the court system through a civil case to enforce her right to obtain protection from her husband.

Cycles of litigation attend recognition of and creation of new rights. As sensitivity to racism, sexism, or other forms of injustice develops, the government responds by setting up new sets of rights. The new formally recognized rights create the possibility of litigating disputes. Conflicts that were previously private, hidden, and unrecognized surface and enter the courts. A period of intense litigation follows. Companies concerned about avoiding litigation, for example, promulgate guidelines and hire experts to sensitize their employees. Assuming there is no backlash, things settle down after a while. We are seeing this cycle at work in relation to sexual harassment, racial integration, decisions to protect workers' rights to jobs and retirement funds, and various of the other social transformations of the last few decades.

III. IMPLICATIONS OF CLOSING THE COURTHOUSE DOOR THROUGH PRIVATIZATION OF JUSTICE

Procedures, jurisdictional rules, and other seemingly neutral devices that affect people's ability to use the courts are part of a complex set of social relations. Any device—whether ADR or changes in formal litigating procedure—that makes it more difficult to get into court, has a substantive effect on how people see their rights in the real world.⁴⁹

⁴⁸ *Id.* at 878. This implies increased emphasis on mediation in quasi-criminal family and neighbor disputes. See *infra* part VI.

⁴⁹ See Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1922 (1989); Jack B.

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The movement to privatize justice must be put in the context of a variety of recent procedural and substantive modifications designed to limit plaintiffs' access to the courts.⁵⁰ These modifications include reducing venue over defendant corporations in diversity suits;⁵¹ increasing minimum amounts in diversity cases;⁵² increasing the complexity of pleading requirements;⁵³ increasing the availability of summary judgment;⁵⁴ limiting the availability of habeas corpus relief;⁵⁵ instituting "loser pays" rules in civil tort litigation;⁵⁶ shortened statutes of limitation such as those in proposed tort reform measures;⁵⁷ and increasing the availability of sanctions under Rule 11.⁵⁸ Access to the courts may be implicated in fee-setting,⁵⁹

Weinstein, *The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 12, 28 (1988); cf. Galanter, *supra* note 16, at xii ("Even where it can be shown that one process is cheaper and faster than another, such a demonstration is necessarily incomplete, for it is necessary to ask whether what is obtained for the lower cost is equally desirable.").

⁵⁰ See Stienstra & Willging, *Alternatives*, *supra* note 2, at 57 ("Mandatory ADR amounts to tort reform under the guise of court reform and has the subtle effect of diminishing opportunities for jury trial for most litigants by reallocating court resources to alternatives."); See generally Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 BROOK. L. REV. 827, 832 (1993) [hereinafter Weinstein, *Procedural Reform*]; Anthony Lewis, *Tilting the Scales*, N.Y. TIMES, Feb. 3, 1995 at A19. For a discussion of the current political struggle, see, e.g., Martha M. Hamilton, *Product Liability Bill Facing Veto*, HARTFORD COURANT, Mar. 17, 1996, at A1, A14; Richard B. Schmitt, *Planned Veto of Liability Bill is Business's Loss*, WALL ST. J., Mar. 18, 1996, at A2, A6; Judith Resnick, *Procedural Innovations, Sloshing Over: A Comment on Deborah Hensler, A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1627 (1995).

⁵¹ 28 U.S.C. § 1332(c)(1) (1988).

⁵² 28 U.S.C. § 1332(a) (1988).

⁵³ FED. R. CIV. P. 9(b) as interpreted.

⁵⁴ See, e.g., *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

⁵⁵ See, e.g., *Herrera v. Collins*, 113 S. Ct. 853 (1993); *Coleman v. Thompson*, 501 U.S. 722 (1991).

⁵⁶ See *supra* note 50.

⁵⁷ See *supra* note 50.

⁵⁸ Rule 11 as amended was inconsistent with "the liberal access policy of the Federal Rules and the overall American system of rewarding risktaking in the bringing of lawsuits." Weinstein, *Procedural Reform*, *supra* note 50, at 836. Fortunately, this "reform" has been abandoned. FED. R. CIV. P. 11 advisory committee's note ("to remedy problems that have arisen in the interpretation of the 1983 version of the rule").

⁵⁹ See PROPOSED LONG RANGE PLAN, *supra* note 2, at 108 ("Recommendation 90: Litigants should pay reasonable filing fees and certain services above a basic level should be

lack of resources to appoint counsel in civil cases,⁶⁰ and failing to provide a court process comprehensible to laypeople, particularly potential pro se litigants and foreign-speaking litigants.⁶¹

The resistance of the appellate courts to consolidations in cases such as those alleging repetitive stress syndrome⁶² and those brought by hemophiliacs who contracted HIV from tainted blood⁶³ can be considered part of the same pattern of restriction of plaintiffs' access to the courts. Consolidations of cases may, in many situations, offer the only real hope for recovery by plaintiffs faced with great discovery and expert witness costs in individual cases.

As a society, have we grappled openly and intelligently with how we are going to allocate this increasingly scarce resource—the federal and state courthouse?⁶⁴ Are we in danger of shutting the courthouse door to the have-nots with the excuse of procedural and substantive reform?⁶⁵ Any change which increases the difficulty of bringing suit will have a disproportionate effect on the poor and relatively powerless.⁶⁶

funded by reasonable user fees.”).

⁶⁰ Cf. Jon Newberry, *Staying Alive*, A.B.A. J., Apr. 1995, at 89 (describing vulnerability of Legal Services Corporation in era of reform-minded, budget-cutting Congress).

⁶¹ See PROPOSED LONG RANGE PLAN, *supra* note 2, at 108–09, 112–14; Jack B. Weinstein, *Advice to Criminal Defendants in Criminal Cases*, translated into Spanish, Chinese, and French (E.D.N.Y. 1995).

⁶² *In re Repetitive Stress Injury Litig.*, 11 F.3d 368 (2d Cir. 1993).

⁶³ *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995). Compare the Japanese settlement of H.I.V. cases based partly on an apology. Andrew Pollock, *Japanese Suits on H.I.V.-Tainted Blood Settled*, N.Y. TIMES INT'L., Mar. 15, 1996, at A3.

⁶⁴ See Galanter, *supra* note 16, at xiv (“[S]orting disputes by their suitability to particular dispute processes is not a technical exercise but a political choice of which kinds of disputes deserve which kinds of response, which in turn reflects our commitments about the good society and the good life.”).

⁶⁵ Weinstein, *Procedural Reform*, *supra* note 50, at 832–34; see also Sherman, *supra* note 2, at 1559 (suggesting that channelling cases to ADR is more attractive to policymakers than direct “tort reform” since it is a neutral “process” seemingly removed from ideology).

⁶⁶ See Lewis, *supra* note 50, at A19 (noting the effect of proposed tort reform measures will be to “insulate the rich and powerful from being called to account at law”); Burton D. Fretz & Ethel Zelenske, *Judicial Conference Weighs Cutbacks in Federal-Court Jurisdiction*, 28 CLEARINGHOUSE REV. 1261, 1265 (1995) (“Perfect justice inside the courtroom becomes meaningless if the courthouse doors are closed to the poor.”). Seeking to keep the courts abreast of developments in the ADR system, the Federal Judicial Center has issued a number of monographs. See, e.g., Steven Hartwell & Gordon Bermonth, *Alternative Dispute Resolution in a Bankruptcy Court: The Mediation Program in the Southern District of*

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A. Exacerbation of Power Imbalances

Acting as neutral umpires, courts traditionally have had to look out for parties who lack the resources or the capacity to protect their own interests in the face of a better-funded or more-informed adversary.⁶⁷ It was an aspect of this "equalizing" of the formal legal system that the ancients sought to capture in the code of Hamurabi, and which Pericles evoked as he lay on his death bed in Fifth Century B.C. Greece:

Our constitution is called a democracy because power is in the hands not of a minority but of a whole people. When it is a question of settling private disputes, everyone is equal before the law . . . [J]ust as our political life is free and open so is our day-to-day life in our relations with

California (Federal Judicial Center 1988); M. Daniel Jacobovitch & Carl M. Moore, *Summary Jury Trials in the Northern District of Ohio* (Federal Judicial Center 1982); E. Allan Lind & John E. Shepard, *Evaluation of Court-Annexed Arbitration in Three Federal District Courts* (Federal Judicial Center 1983); Barbara S. Meierhoefer, *Court-Annexed Arbitration in Ten District Courts* (Federal Judicial Center 1990); Stienstra & Willging, *Alternatives*, *supra* note 2; Kathy L. Stuart, *The Wayne County Mediation Program in the Eastern District of Michigan* (Federal Judicial Center 1984); Karl Tegland, *Mediation in the Western District of Washington* (Federal Judicial Center 1984). State court systems are making similar efforts. See, e.g., Daniel A. Noonan & Judith M. Bostetter, *Alternative Dispute Resolution in Wisconsin: A Court Referral System*, 78 MARQ. L. REV. 609 (1995); Peggy L. Chown & John H. Parham, *Can We Talk? Mediation in Juvenile Cases*, F.B.I. LAW ENFORCEMENT BULL., Nov. 1995, at 21; *Proposed Final Report of the Chief Judge's New York State Alternative Dispute Resolution Project*, Court-Referred ADR in New York State, Sept. 1, 1995. Arbitration by federal agencies in public contract cases is also being encouraged. See *Tenaska Washington Partners II L.P. v. United States*, 34 Fed. Cl. 434 (1995) (federal agencies not barred from entering into agreements to submit to binding arbitration).

⁶⁷ See PROPOSED LONG RANGE PLAN, *supra* note 2, at 66. The Judicial Conference explained:

Private forums should be encouraged, but the federal courts must not shed their obligation to provide public forums for disputes that need qualities that federal courts have traditionally provided, including at a minimum a neutral and competent decision-maker and the protection of weaker parties' access to information and power to negotiate a dispute. Court supervision of ADR programs may be the only means of ensuring satisfaction of those conditions in some cases, although referral to private dispute resolvers may well serve as part of a court-supervised program.

Id. at 66.

each other. We do not get into a state with our next-door neighbor if he enjoys himself in his own way, nor do we give him the kinds of black looks which, though they do no real harm, still do hurt people's feelings. We are free and tolerant in our private lives; but in public affairs we keep to the law. This is because it commands our deep respect.

We give our obedience to those whom we put into positions of authority, and we obey the laws themselves, especially those which are for the protection of the oppressed, and those unwritten laws which it is acknowledged shame to break.⁶⁸

In every case, the judge has an obligation to do what he or she can to ensure that mismatching of resources will not skew the substantive result. If a judge believes that the factual record has not been well presented, he or she can turn to magistrate judges and appointed special masters to develop it. If a party fails to provide a good brief on the law, the judge can turn to law clerks and potential amicus for research to supplement the briefings.

Arbitrators, especially those drawn from industry panels, may not feel the same responsibility to produce a full factual and legal record. Alternatively, they may lack access to resources to make up for imbalances.

The problem is more than academic, as the experience of dispute-resolution in the securities industry demonstrates.⁶⁹ Corporations and businesses familiar with the "ins" and "outs" of the federal and state arbitration laws have engaged in strategic behavior that puts consumers at a disadvantage. For example, brokerage firms have long drafted customer contracts providing that disputes would be arbitrated and that New York law would govern.⁷⁰ What consumers ignorant of the law never found in the small print was that New York law forbids arbitrators to award punitive damages.⁷¹

The Supreme Court, in *Mastrobuono v. Shearson, Lehman Hutton, Inc.*, recently refused to apply the New York law on punitive damages to one such contract, finding insufficient evidence that the petitioners intended to give up their right to such damages.⁷² The Court explained that: "[a]s a

⁶⁸ Pericles' Funeral Oration, in 2 THUCYDIDES, THE PELOPONNESIAN WAR 117 (Rex Warner trans., Penguin Books 3d prtg. 1959).

⁶⁹ See generally Norman S. Poser, *When ADR Eclipses Litigation: The Brave New World of Securities Arbitration*, 59 BROOK. L. REV. 1095 (1993); Floyd Norris, *What to Do About Broker Arbitrations?*, N.Y. TIMES, Jan. 23, 1996, at D1.

⁷⁰ Karen Donovan, *The Arbitration Question: Why No Punitive Awards?*, NAT'L L.J. NEW YORK, Jan. 23, 1995, at B1.

⁷¹ See *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793 (N.Y. 1976).

⁷² *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212 (1995); see also

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practical matter, it seems unlikely that [the investors in the case] were actually aware of New York's . . . approach to punitive damages, or that they had any idea that by signing a standard-form agreement to arbitrate disputes they might be giving up an important substantive right" when they agreed to be bound by New York law.⁷³ The problem of investor ignorance implicated in *Mastrobuono* becomes more acute as Congress moves to discourage security fraud court cases.⁷⁴

The fact that members of arbitration panels are often drawn from industry management increases potential unfairness to the consumer.⁷⁵ Contracts of adhesion reflecting imbalances in power and knowledge between the parties are routinely invalidated by the courts. As the *Mastrobuono* decision demonstrates, mandatory arbitration clauses cannot be the exception to the courts' skeptical treatment of adhesion contracts.⁷⁶

B. Creation of Two-Tiered System of Justice

ADR is "viewed by many as the most promising bridge over the gap between legal needs and affordable services."⁷⁷ There is the risk, however,

Linda Greenhouse, *Court Backs Investors on Damage Awards*, N.Y. TIMES, Mar. 7, 1995, at D5.

⁷³ *Mastrobuono*, 115 S. Ct. at 1219.

⁷⁴ See Weinstein, *Procedural Reform*, *supra* note 50, at 832-34.

⁷⁵ Peter F. Blackman, *Arbitration Suit Asserts Constitutional Arguments*, NAT'L L.J., Feb. 27, 1995, at B1, B2. Other aspects of arbitration that may be of concern are the lack of a written record and findings of fact and law, and the right of arbitrators to disregard statutory law in reaching their decisions. *Id.*

⁷⁶ See, e.g., *Prudential Insurance Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995) (employees not bound by signed agreement to arbitrate discrimination claims where they did not knowingly forego statutory remedies in favor of arbitration); Steven A. Holmes, *Employers' Ability to Require Bias-Case Arbitration is Curbed*, N.Y. TIMES, Dec. 23, 1994, at A28 (discussing *Prudential*); cf. Blackman, *supra* note 75 (discussing recently filed case, *Duffield v. Robertson, Stephen & Co.*, that raises Seventh Amendment due process and right to jury challenges). State laws requiring full notice of possible arbitration clauses in consumer contracts are appropriate. See, e.g., *Casarotto v. Lombardi*, 886 P.2d 931 (Mont. 1994) (notice must be placed on front page); *Stephens v. American International Ins. Co.*, 66 F.3d 41 (2d Cir. 1995) ("anti-arbitration" provision in Kentucky statute governing insurer liquidation valid). See also Harold Brown, *Application and Limits of Alternative Dispute Resolution*, N.Y. L.J., Jan. 25, 1996, at 3, 6 (limits on federal preemption of state legislation protecting against "arbitration surprises").

⁷⁷ James Podgers, *Chasing the Ideal: As More Americans Find Themselves Priced Out of the System, the Struggle Goes on to Fulfill the Promise of Equal Justice for All*, A.B.A. J., Aug. 1994, at 56, 60; see also Silbey & Sarat, *supra* note 20, at 450-52 (discussing aspects

that as the rich move out of the courts to private dispute resolution forums, only criminals and the poor will be left in the courts, thus, reducing the effective power of these institutions over all society.⁷⁸

A recent news report confirms the immediacy of the threat that increased resort to ADR will result in creation of "a two tier system of justice."⁷⁹ According to the report, California's "three strikes law" is forcing diversion of civil judges to criminal trials to handle the increased caseload.⁸⁰ With the public resources to handle civil cases shrinking, some are predicting that one day only the rich will have recourse to civil litigation—by hiring private judges as provided for under California law. We can imagine without much difficulty a future "in which wealthy litigants will use private ADR while the poor and powerless will be consigned to public courts which government will have little incentive to fund because their constituents lack political clout."⁸¹ This would create a situation analogous to what has happened to public education in some of our central cities because of the middle class exodus to private schools and the suburbs.

C. *Reduced Protection of the Public Welfare*

Another problem with extrajudicial dispute resolution is that no one may be monitoring the disclosures made during a process with an eye to the public's interest and welfare.⁸² The amenability of ADR to developing

of "access to justice" arguments made in support of ADR).

⁷⁸ See, e.g., Podgers, *supra* note 77, at 61 (describing funnelling of cases out of the courts to disadvantage of poor people and criminal defendants).

⁷⁹ Haig & Caley, *supra* note 14, at 194.

⁸⁰ Fox Butterfield, '3 Strikes' Law in California is Clogging Courts and Jails, N.Y. TIMES, Mar. 23, 1995, at A1, B11.

⁸¹ Haig & Caley, *supra* note 14, at 194; see also Podgers, *supra* note 77, at 61 (drawing analogy between harm to public education due to loss of public support, and potential harm to public court system if big institutions exit the system for private dispute resolution); CONFLICT MANAGEMENT NEWSLETTER (Sec. of Litig., Am. Bar Assoc.), Winter 1994, at 1, 2 ("[M]andatory arbitration would hurt parties of lower economic means who could not afford the process costs of taking a second bite at the apple offered by a trial *de novo*.").

⁸² See, e.g., Borzou Daragahi, *Environmental ADR*, N.Y. L.J., Sept. 8, 1994, at 5. See generally William H. Schroder, Jr., *Private ADR May Offer Increased Confidentiality*, NAT'L L.J., July 25, 1994, at C14. Parties in a civil case may always sign a nondisclosure agreement when they settle, but the judge may reveal the proceedings in the interests of public policy. See *id.* (discussing cases); cf. Cerisse Anderson, *Sealing Order Granted for Partial Settlements*, N.Y. L.J., Aug. 9, 1994, at 1 (granting protective order concerning amounts paid in partial settlement of repetitive stress injury suit, citing public policy in favor of

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resolutions in which discovery, admissions of liability and damages remain undisclosed is seen by some to be part of ADR's attraction.⁸³ The problem is not endemic to extra-judicial resolution; any time a case is settled, there may be attempts to keep under seal a good deal of the information that surfaces in discovery.

There may be a public interest in having the information revealed. In a products liability suit, for example, the potentially negative health affects of a particular pharmaceutical may not yet have been publicized. The courts themselves are not always sufficiently cognizant of their obligation to society to prevent the privatization of vital information which affects the public welfare.⁸⁴

At least in the courts, judicially supervised procedures must be followed before documents and judgments will be placed under seal.⁸⁵ Documents can be unsealed later if need arises.⁸⁶ These protections, while institutionalized in the court system, may be lacking in the context of extrajudicial dispute resolution.

D. Denigration of Right to Jury Trial

A concern with mandatory arbitration, and court-annexed mandatory arbitration in particular is the loss of the right to trial by jury.⁸⁷ The Equal Employment Opportunity Commission has stated its opposition to use of such mandatory procedures in workplace disputes, including claims of

settlement).

⁸³ See Anderson, *supra* note 82; see also Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1494 & n.87 (1994). Professor Resnik explains that "express rights of public access have not accompanied the more recent creation of court-sponsored settlement negotiations and alternative dispute resolution techniques." *Id.* She asserts that in the absence of legislation stating otherwise, court-annexed arbitration awards "become judgments of the court and . . . fall under general rules of public access to court records." *Id.*

⁸⁴ WEINSTEIN, *INDIVIDUAL JUSTICE*, *supra* note 2, at 66.

⁸⁵ See, e.g., FED. R. CIV. P. 26(c) (6)-(7) (sealing of depositions and material relating to "trade secrets or other confidential research," "for good cause" as "justice requires"). See generally 8 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2042 (1995).

⁸⁶ See WRIGHT ET AL., *supra* note 85, § 2044.1 ("Modification of Protective Orders"). *In re Agent Orange Prod. Liability Litig.*, 821 F.2d 139 (2d Cir. 1987), *cert. denied*, 484 U.S. 926 (1987).

⁸⁷ See G. Thomas Eisele, *The Case Against Mandatory Court-Annexed ADR Programs*, JUDICATURE, June-July 1991, at 34.

discrimination.⁸⁸

Yet, resolving disputes before they get to court is hardly denial of the right to a jury. In the Eastern District of New York, the Long Island Marriott Hotel uses a panel of employees to adjudicate disputes about management discipline of employees.⁸⁹ They keep discrimination issues out of court while employer-employee relations are improved. Additionally, consumers are increasingly turning to credit card companies such as American Express to mediate disputes with merchants, thus avoiding the small claims court.

VI. RESPONSES TO TRADITIONAL RATIONALES FOR PRIVATIZING JUSTICE

A. Court Docket Pressures

A recurrent theme in the rhetoric of those advocating an increased role for ADR and other procedural reforms that implicate the accessibility of the courts is the need to respond to a so-called "litigation explosion."⁹⁰ For example, to put into context its suggestions for procedural and substantive law reform, the recently issued *Proposed Long Range Plan for the Federal*

⁸⁸ See Richard C. Reuben, *Two Agencies Review Forced Arbitration*, A.B.A. J., Aug. 1995, at 26.

⁸⁹ Kirk Johnson, *You're Fired! See You Out of Court; Using In-House Panels to Keep Disputes Within a Company*, N.Y. TIMES, Mar. 29, 1995, at B1.

⁹⁰ Cf. THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 32 (1994) (noting prevalence of "[h]yperbole and metaphor" among those seeking to justify court reform by the increased volume of cases); William K. Slate II, *Arbitration Comes of Age*, AM. LAWYER, May 1995, at 8, ("[F]aced with staggering backlogs, state and federal courts are now formally urging attorneys to turn to dispute resolution services for cases that do not, per se, require a judge."). The classic formulation states:

With the spiraling costs, excessive delays, and exploding caseloads of the civil courts, many disputants view traditional litigation as unable to meet their conflict resolution needs. More and more parties are turning away from the judicial system and are resorting to private dispute resolution firms. Recognizing this growing trend . . . , an increasing number of state and federal courts are offering a wide range of ADR mechanisms to litigants.

Lucille M. Ponte, *Putting Mandatory Summary Jury Trial Back on the Docket: Recommendations on the Exercise of Judicial Authority*, 63 FORDHAM L. REV. 1069, 1069-70 (1995).

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Courts describes a "[p]ossible [s]cenario for the [f]uture" that sounds like legal armageddon.⁹¹ The report assumes that "the federal courts' civil and criminal jurisdiction [will] continue[] to grow at the same rate it did over the past 53 years" to paint a "nightmarish" picture of the docket in the year 2020: civil cases exceeding 1 million, criminal cases reaching 900,000, appeals approaching 325,000, expansion of the federal bench to 4,000, and a "babel" of federal common law.⁹²

1. *The Pressures are Overstated*

While no one can predict the future with accuracy, the recent empirical data concerning the present situation suggests that claims of a litigation explosion are grossly overstated.⁹³ Nevertheless, many judges do think that there is a problem.⁹⁴ As a result, their enthusiasm for using ADR to handle the volume of cases is fairly high.⁹⁵ Contrary to the view held by the Chicken Littles of the world, tort filings have declined in many states since 1986.⁹⁶ Some states that have initiated tort reforms, such as limits on

⁹¹ PROPOSED LONG RANGE PLAN, *supra* note 2, at 18-19.

⁹² *Id.*

⁹³ See Stienstra & Willging, *Alternatives*, *supra* note 2, at 33-35 (noting that "in the aggregate, federal civil caseloads have been decreasing in recent years," and that "the civil trial rate . . . is already very low and has been steadily declining for the past decade in nearly all federal courts, those with ADR and those without ADR alike"); see also Eisele, *supra* note 87, at 34, 38 (one judge's experience suggests that claims of unmanageable dockets are "hyperbole"); Eric Moller, *Trends in Civil Jury Verdicts Since 1985*, xiv-xv (Rand Institute of Justice 1996) ("[T]rial rates—as measured by the number of verdicts per capita—are generally flat or decreasing. This could reflect stable or decreasing filing rates; it could also reflect an increased tendency to settle rather than try cases. In either event, the number of civil cases reaching verdict is not climbing dramatically."); *But cf. Caseload Increases Throughout Judiciary*, THIRD BRANCH, Mar. 1996, at 1, 2.

⁹⁴ The Federal Judicial Center conducted a survey to determine the nature and severity of the problem in the Federal Court. *Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Judges* (Federal Judicial Center 1994). With respect to the "[v]olume of civil cases," federal courts of appeals judges responded as follows: 7.4% said it was "[n]ot a problem at all"; 10.1% "[a] small problem"; 30.9% "[a] moderate problem"; 33.5% "[a] large problem"; 13.3% "[a] grave problem." *Id.* at 3. Federal district judges seemed less disturbed; their answers were, respectively: 18%, 16.1%, 33.5%, 22.7%, 8.1%. *Id.* at 25.

⁹⁵ See *Id.* at 43 (44.9% of court of appeals judges, and 55% of district court judges, "moderately" or "strongly" agreed that "[t]here is a need for ADR in my court due to the volume of cases").

⁹⁶ John E. Morris, *Bar Talk: By the Numbers*, AM. LAW., June 1995, at 18.

punitive damage awards and modification of joint and several liability for damages, have actually experienced an *increase* in tort filings, while others have seen a decrease.⁹⁷ While much of the "litigation explosion" is said to be the result of peoples' filing suit for any physical injury, the data suggests that people are reluctant to use the courts.⁹⁸

The situation in the federal courts is mixed but suggests no civil emergency. Total filings in the federal courts declined by eight percent in 1994 compared to 1993.⁹⁹ This figure represents a three percent increase in civil case filings,¹⁰⁰ including an eighteen percent increase in product liability and personal injury cases,¹⁰¹ and a three percent decrease in criminal case filings.¹⁰² The decrease in the federal criminal docket reflects a drop in drug cases, probably due to staff problems and changes in Department of Justice policies deemphasizing prosecution of small-scale offenders.¹⁰³

In the Second Circuit, where the author sits, the court of appeals and the district courts have recently experienced net decreases in both civil and criminal filings.¹⁰⁴ The author's experience in the Eastern District of New York, one of the busiest districts in the federal court system,¹⁰⁵ is that criminal prosecutions of low-level drug mules and expansion of criminal jurisdiction to areas traditionally left to the states are what is burdening our

⁹⁷ *Id.*

⁹⁸ See *Braune v. Abbott Labs.*, 895 F. Supp. 530, 551 (E.D.N.Y. 1995) (citing Harvard Medical Malpractice Study, *Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York* (1990); DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES (Rand, R-3999-HHS/ICJ, 1991)).

⁹⁹ Edward A. Adams, *New Filings Down in Second Circuit, District Courts*, N.Y. L.J., Apr. 3, 1995, at 1.

¹⁰⁰ *Id.*

¹⁰¹ *Report Reflects Judiciary's 1994 Caseload*, THIRD BRANCH, Mar. 1995, at 1, 2 [hereinafter *Report*].

¹⁰² Adams, *supra* note 99, at 1.

¹⁰³ *Report*, *supra* note 101, at 2 (drug cases declined by 7% in 1994, following a 5% drop in 1993).

¹⁰⁴ Adams, *supra* note 99, at 1. Filings in the court of appeals declined by 8% during the period; district court civil case filings decreased by 1% and criminal case filings by 10%. *Id.*

¹⁰⁵ See Letter from Hon. Eugene H. Nickerson, Senior Judge, United States District Court for the Eastern District of New York, to Hon. Otto R. Skopil, Jr., Chairman, Committee on Long Range Planning, Judicial Conference of the United States, Dec. 1, 1994, at 2 ("The district presently stands first within the Second Circuit and fifth among all ninety-four districts in the number of pending cases and weighted filings per judgeship.").

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dockets. The experience with large increases in alcohol cases in the twenties and thirties and the drop-off after prohibition was abolished suggests that a shift towards a medical-educational model in drug control may lead to a reduction of criminal drug cases. It seems doubtful that the public will want to continue indefinitely paying the huge price for our unnecessarily punitive incarceration policies.

2. Flexible Procedures and New Technologies Can Make the Docket Pressures Manageable

a. Procedures

i. Setting Trial Dates

Perhaps the most significant step that a judge can take to propel a case to resolution is to set a trial date. Recognizing this factor, the Civil Justice Reform Act identifies "setting early, firm trial dates" as a "principle[] and guideline of litigation" to be considered by the federal courts as they develop their civil justice expense and delay reduction plans.¹⁰⁶ Another possible suggestion, one that also has been put forward in connection with proposals to modify the English and Wales civil justice systems, is to preset the amount of time that will be allocated for trial.¹⁰⁷ Case management can undoubtedly be somewhat improved.¹⁰⁸

ii. Consolidation

In complex litigations such as mass torts, the case management challenges can be better met through creative use of existing procedures, particularly methods of consolidation.¹⁰⁹ The legal and factual problems do not vary greatly among plaintiffs injured by the same substance or

¹⁰⁶ 28 U.S.C. § 473(a) (2) (B) (1995).

¹⁰⁷ Cf. WOOLF REPORT, *supra* note 2, at 20 ("The maximum length of any trial should be pre-determined and that length should only be exceeded for good reason.").

¹⁰⁸ See David W. McKeague, *Differentiated Case Management Can Help Make ADR More than an "Intermediate Irritating Event"*, FJC DIRECTIONS, Dec. 1994, at 12, 13 (advocating "use of early scheduling conferences to discuss the issues and merits of each case, including the feasibility of ADR and the assignment of cases to tracks"); see also WOOLF REPORT, *supra* note 2, (support, in context of British and Welsh civil reform effort, for different tracks for different types of cases).

¹⁰⁹ See Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269. See generally WEINSTEIN, *INDIVIDUAL JUSTICE*, *supra* note 2.

instrumentality.¹¹⁰ Aside from its case management benefits, consolidation may be necessary as a resource-pooling device to initiate and fund scientific research needed to determine liability.¹¹¹

Each of the tools currently used to consolidate cases—the multi-district litigation (“MDL”) statute,¹¹² the class action device and bankruptcy jurisdiction—has significant drawbacks. Consolidation under the MDL statute, for example, is limited only to pretrial proceedings. Class actions are useful, but certification of classes is often hampered by the outdated nature of our conflicts and personal jurisdiction law.¹¹³ Some procedural and substantive aspects of tort law must be “federalized” if we are to resolve mass disasters fairly and efficiently.

Appropriate national consolidation of multi-state cases has been discouraged by the fact that each state has its own substantive law, and by the outmoded constitutional jurisprudence of personal jurisdiction which remains based on 19th century assumptions. The Seventh Circuit, in denying certification of the class action brought by hemophiliacs exposed to HIV-tainted blood, cited the “esperanto” nature of the proposal to homogenize the fifty different states substantive law of torts in the class action.¹¹⁴ The author faced similar problems in *Agent Orange*, the Manville Asbestos cases and the DES cases and they were not insuperable. Only through consolidation by class action, bankruptcy and other devices, and by appropriate handling of the state law-*Erie* problem, was a satisfactory

¹¹⁰ *In re “Agent Orange” Prod. Liab. Litig.*, 580 F. Supp. 690 (E.D.N.Y. 1984) (“While those close to the American law scene tend to emphasize the diversity of substantive law among the states and between the states and the federal government, to outside observers much of the differences must appear as significant as that among the Lilliputians to Swift’s hero.”). *But see In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (suggesting “esperanto” to meet variations in state law).

¹¹¹ *See Braune*, 895 F. Supp. 547; Weinstein, *Lesson, supra* note 2, at 13-18.

¹¹² 28 U.S.C. § 1407 (1995) (permitting consolidated pretrial proceedings for “civil actions involving one or more common questions of fact pending in different districts”).

¹¹³ *See* Martin H. Redish & Eric J. Beste, *Personal Jurisdiction and the Global Revolution of Mass Tort Litigation: Defining the Constitutional Boundaries*, 28 U.C. DAVIS L. REV. 917 (1995). Another problem is appellate court skepticism about class certification, some of which is well-founded and some of which may be based on appellate judges’ lack of awareness of the practicalities of the trial court. As an example of the latter see *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (denying certification of class action brought by hemophiliacs infected with AIDS through use of defendants’ tainted blood products); *In re Repetitive Stress Injury Litig.*, 11 F.3d 368 (2d Cir. 1993) (rejecting consolidation of 44 cases in the Eastern District of New York asserting claims for repetitive stress injuries).

¹¹⁴ *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1299.

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resolution obtained.

A comprehensive approach to these national problems is preferable to the ad hoc solutions that have been adopted in individual cases.¹¹⁵ Unfortunately, some proposals for national tort reform are somewhat less than sensitive to the varied interests at stake.¹¹⁶ How to balance efficiency offered by consolidation of dispute resolution in a single forum with the desire to preserve the individual states' sovereignty and the desire of litigants to control their own disputes is vexing, but can be resolved.¹¹⁷

Where a claim is based on a contract that calls for arbitration, class arbitration may be useful. For example, in *Keating v. Superior Court (Southland Corp.)*,¹¹⁸ a California court found the authority to consolidate claims for class-wide arbitration. In contrast, however, the Seventh Circuit court of appeals held in *Champ v. Siegal Trading Co.*,¹¹⁹ that a district court lacks authority to certify a class arbitration action in the absence of a specific authorizing provision in the parties' arbitration agreement.¹²⁰

¹¹⁵ Cf. Linda J. Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131 (1989) (describing how proliferation of judicial adjuncts and specialized rulemaking has undermined the uniformity and transubstantivity of the federal rules, and arguing for broad procedural reform building on the courts' experiences in these areas). But cf. Edwin Wesely, *The Civil Justice Reform Act; The Rules Enabling Act; The Amended Federal Rules of Civil Procedure; CJRA Plans; Rule 83—What Trumps What?*, 154 F.R.D. 563 (1994).

¹¹⁶ The Common Sense Product Liability Legal Reform Act of 1996, H.R. 956, 1042 Cong., 2d Sess. (1996), and currently being considered in the Senate, would limit consumers' ability to recover in product liability actions—both state and federal—in a number of ways. Among its provisions, it (1) places caps on punitive damages; (2) eliminates joint liability with respect to noneconomic loss damages; (3) establishes a two year statute of limitations, triggered from when the claimant discovered his or her harm and its cause, for product liability actions; (4) establishes a 15 year statute repose in product liability actions measured from delivery of the product; and (5) limits liability of product sellers, renters and leasing companies. At the time of writing, the measure was expected to be approved by both the Senate and House of Representatives in the spring of 1996, and to face a Presidential veto. Neil A. Lewis, *Backers of Limits on Lawsuits Win a Victory in the Senate*, N.Y. TIMES, Mar. 21, 1996, at A22.

¹¹⁷ AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT (Tentative Draft No. 3, Mar. 31, 1992); WEINSTEIN, *INDIVIDUAL JUSTICE*, *supra* note 2, at 42.

¹¹⁸ 645 P.2d 1192 (Cal. 1982), *rev'd on other grounds sub nom.*, *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

¹¹⁹ 55 F.3d 269 (7th Cir. 1995).

¹²⁰ For other cases finding no authority to engage in class-wide arbitration, see Julie A. Signoriello, *The Resolution of Class Actions*, N.Y. L.J., July 6, 1995 at 3-4.

b. *Judicial Adjuncts*

The wise and selective use of a full array of judicial adjuncts is one key to preserving the courts' ability to render justice in the face of more cases of greater complexity.¹²¹ Such aides include magistrate judges and special masters. In resolving the *Agent Orange* and other multiparty litigations, the author relied heavily on such judicial assistance.¹²² They were invaluable in determining what issues were at stake in these complex and often confusing litigations, and in helping the parties move towards settlement.¹²³

i. *Special Masters*

Rule 53 authorizes the courts to appoint "special masters."¹²⁴ Under this rule "reference to a master" is to be "the exception, not the rule," in cases where "the issues are complicated," and "only on a showing that some exceptional condition requires it."¹²⁵ Referral can also be by consent of the parties, in which case the restrictions of Rule 53 may not apply.¹²⁶

¹²¹ See PROPOSED LONG RANGE PLAN, *supra* note 2, at 65. The Proposed Plan explains:

A conventional bench or jury trial is very expensive and not the best resolution for every dispute initiated in the district courts. Often, a fair settlement by the parties, with or without court involvement, is the preferable resolution for particular litigation. To this end, the federal courts should be encouraged to offer a wide array of means and methods for resolving civil disputes—while preserving the traditional trial process—through settlement efforts by district judges and magistrate judges, by the effective use of supporting court personnel, and by a variety of alternative dispute resolution techniques that involve members of the bar and other adjuncts.

Id.

¹²² *Hart v. Community Sch. Bd. of Brooklyn*, N.Y. Sch. Dist. #21, 383 F. Supp. 699 (E.D.N.Y. 1974); WEINSTEIN, *INDIVIDUAL JUSTICE*, *supra* note 2.

¹²³ See also PROPOSED LONG RANGE PLAN, *supra* note 2, at 66 (advocating increased reliance on special masters); cf. WOOLF REPORT, *supra* note 2, at 22 (describing the use of "procedural judges" in various case management tasks in context of civil reform in England and Wales).

¹²⁴ See FED. R. CIV. P. 53; see also 28 U.S.C. § 636(b); see also Margaret G. Farrell, *Special Masters*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 575, 595 (Federal Judicial Center 1994) (authority to appoint special masters derives from four sources: consent of the parties, the courts' inherent powers, 28 U.S.C. § 636(b) (2) (1995), and FED. R. CIV. P. 53); Jerome I. Braun, *Special Masters in Federal Court*, 161 F.R.D. 211 (1995).

¹²⁵ See FED. R. CIV. P. 53(b).

¹²⁶ See 28 U.S.C. § 636(b) (1995); FED. R. CIV. P. 53(b).

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The special masters' powers are defined by the referral order.¹²⁷ Subject to the authorizing order, special masters "have many of the same powers that a district judge has to receive and evaluate scientific and technical evidence."¹²⁸ In fact, special masters may have more flexibility—akin to that of arbitrators—in "shap[ing] the rules of procedure to the particular requirements of the case."¹²⁹

The propriety of appointing special masters in bankruptcy cases is subject to some dispute.¹³⁰ This consideration led the author to use a semantic substitute—the court-appointed "special advisor"—in the *Manville Bankruptcy-Trust* litigation.¹³¹

ii. Magistrate Judges

In the Eastern District of New York, magistrate judges have coordinated all pretrial discovery in civil cases.¹³² Each case is automatically assigned to both an Article III judge and a magistrate judge on intake.¹³³ In addition to controlling discovery, Magistrate judges typically do any intensive factfinding that is necessary to resolve pretrial issues. Magistrate judges can be used to a greater extent than they are in many

¹²⁷ See FED. R. CIV. P. 53(c).

¹²⁸ Farrell, *supra* note 124, at 598; see also FED. R. CIV. P. 53(c) (authority of special masters to call and swear witness and parties, and require production of documents).

¹²⁹ Braun, *supra* note 124, at 221.

¹³⁰ See, e.g., *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) (reference to special master exceeding court's authority); *Stauble v. Warrob*, 977 F.2d 690 (1st Cir. 1992) (similar); *In re Bituminous Coal Operators' Assoc.*, 949 F.2d 1165 (D.C. Cir. 1991) (similar).

¹³¹ See *In re Joint E. & S. Dist. Asbestos Litigation*, 878 F. Supp. 473 (E. & S.D.N.Y. 1995) (Mark Pederson, Special Advisor to the Courts).

¹³² See *Eastern District's Standing Orders of the Court on Effective Discovery in Civil Cases*, in UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK, JOINT RULES FOR GENERAL, CIVIL, CRIMINAL, ADMIRALTY AND MAGISTRATE JUDGE PROCEEDINGS 61, 62 (10th prtg. 1995). The Eastern District Rules provide:

A magistrate judge shall be assigned to each case upon the commencement of the action [except in certain enumerated actions]. . . . Except in multi-district cases and antitrust cases, a magistrate judge so assigned is hereby empowered to act with respect to all non-dispositive pretrial matters unless the assigned district judge orders otherwise.

Id.

¹³³ *Id.*

jurisdictions.¹³⁴ We find them particularly useful in achieving settlements.

Court-Annexed ADR Programs. Some court-annexed programs provide, in a sense, judicial adjuncts since they involve oversight by an Article III judge.¹³⁵ For example, in the Eastern District of New York, the determination of whether to refer matters to an early neutral evaluation panel is left to the judge assigned to the case.¹³⁶ Programs that involve judicial oversight do not implicate the concerns otherwise associated with ADR,¹³⁷ and may be helpful in relieving court dockets. The author's own experience with mediation and arbitration (once the case reaches him after the magistrate judge has supervised discovery) has not been encouraging. If the magistrate judge and the judge can not settle the case it will probably be decided by trial or dispositive motion.

c. *New Technologies*

New technologies should be exploited to improve the public's access to the courts and to streamline adjudication. Creative use of computers, on-line services and other new electronic tools can increase the public's access to the courts. On the Internet's World Wide Web, trivia, graphic images, court transcripts and hourly news feeds can keep the public informed about the details of trials that pique the public interest.¹³⁸ The Arizona Supreme Court has developed an interactive computer system, Quickcourt, that uses text, graphics and voice narration to provide instructions on court matters in English and Spanish.¹³⁹ The system provides an overview of the Arizona

¹³⁴ See PROPOSED LONG RANGE PLAN, *supra* note 2, at 93 (Recommendation 67: "Magistrate judges should perform judicial duties to the extent constitutionally permissible and consistent with sound judicial policy. Individual judges should retain flexibility, consistent with the national goal of full and effective utilization of all magistrate judge resources, to have magistrate judges perform judicial services most needed in light of local conditions and changing caseloads.").

¹³⁵ See part V.A, *infra* (general discussion of court-annexed programs).

¹³⁶ In contrast, referral for arbitration is automatically made by the clerk of the court in matters involving amounts in controversy not exceeding \$100,000. See UNITED STATES DISTRICT COURT, DISPUTE RESOLUTION PROCEDURES IN THE EASTERN DISTRICT OF NEW YORK 6-8.

¹³⁷ See *supra* part III.

¹³⁸ Peter Lewis, *Discussion of the O.J. Simpson Murder Trial is On-Line as Well as on the Air*, N.Y. TIMES, Feb. 14, 1995, at A15. The *Congressional Record* and various Library of Congress resources are also accessible through the World Wide Web. Edmund L. Andrews, *Mr. Smith Goes to Cyberspace*, N.Y. TIMES, Jan. 6, 1995, at A22. See also PROPOSED LONG RANGE PLAN, *supra* note 2.

¹³⁹ Quickcourt was described in some detail in Lynn Wiletsky, *Computerizing Justice*,

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court system and information on landlord and tenant rights, alternative dispute resolution, small claims and legal aid agencies. It can even produce legal documents to be used in court proceedings, including the forms necessary to file for divorce and calculate child-support payments. The on-screen text is at the fourth grade reading level, and the multimedia aspects of the system—audio, highlighting of key words—are designed to assist poor readers. In its first year of operation, 24,000 transactions were conducted.

Computers can also help increase the courts' accessibility to non-English speaking litigants and defendants. I have developed a description of how our criminal justice system operates for distribution to defendants which has been translated into Spanish, French and Chinese. Such a pamphlet for civil litigants would be useful and could be translated by computer, as can other documents.¹⁴⁰

The technological revolution that has created some of the new forms of actions also provides some of the tools for resolving them more efficiently. Computers are already used to expedite case processing, for document imaging and remote filing.¹⁴¹ In the breast implant litigation, electronic transfer of all documents to CD-ROM disks pursuant to Judge Pointer's order made discovery readily available to all attorneys at a reasonable price.¹⁴² At least one lawyer communicates with her clients to explain the

N.Y. TIMES, Jan. 14, 1995, at 23.

¹⁴⁰ Our pro se clerk, an attorney, assists litigants who can not afford an attorney.

¹⁴¹ See generally Gordon Bermant & Winston D. Woods, *Real Questions About the Virtual Courthouse*, JUDICATURE, Sept.-Oct. 1994, at 64; Julie Treidmen, *Plugging in the Courthouse*, AM. LAW., Mar. 1995, at 12; cf. 28 U.S.C. § 481 (1995) (requiring automated retrieval of case status in the district courts). Some courts dealing with the problems of communicating with the hundreds of attorneys that may be used in complex mass tort cases have resorted to computer bulletin boards. See, e.g., Ruth Piller, *Computer to Court's Rescue*, HOUS. CHRON., Nov. 14, 1992, at A37. Cf. Peter W. Martin, *Prospecting the Internet*, A.B.A. J., Sept. 1995 (getting in touch with clients, locating resources, and participating in expert forums); David V. Vandagriff, *A Storehouse of Resources*, A.B.A. J., Sept. 1995, at 57.

¹⁴² Bill Rankin, *New Imaging Technology Speeds Attorney's Access to Documents*, ATLANTA J. & CONST., Mar. 22, 1993, at A7. The documents were scanned using a high-speed computer that created 2,000 images per hour and placed them onto a magnetic tape, which was then transferred to CD-ROM disks. Each CD-ROM disk, containing 16,000 pages of information, was sold together with an index required for searching purposes to lawyers for \$40. One person estimated that it would cost \$1,600 in attorney and paralegal time and effort to access the same amount of information in the traditional way. See also Meredith McClure, *Litigants Create Their Own CDs*, AM. LAW., Sept. 1993, at 100.

status of the case using videocassettes.¹⁴³ We can foresee small claim cases being filed from the local library and being decided in diffused courthouses without walls.

Hearings and trials with participants in far-flung places, connected only through links such as videoconferencing, have been used and widespread utilization is not far away.¹⁴⁴ Potentially, some envision:

a courtroom where the physically separated participants make virtual appearances in an electronically simulated three-dimensional space. Testimony in this setting can consist of computer-simulated experiences of virtual reality. . . . [F]act finders can explore evidence by putting themselves in the middle of a chemical molecule or walking through a burned-out building without leaving the comfort of their chairs.¹⁴⁵

We must proceed cautiously. The Internet is a superhighway for many; for others it is an electronic fence. The "haves" and "have-nots" in society are no longer defined solely in terms of imbalances in wealth, but also in disparities in access to information. Many people are not sophisticated about computers and others lack the resources to gain access to information providers. The Internet, steeped in a tradition of public-minded, if anarchic, civicism, is now in danger of transforming from a "cyberspace" into a "marketspace" that will exclude the poor.¹⁴⁶

¹⁴³ Prepared by Sybil Shainwald, Esq.

¹⁴⁴ Bermant & Woods, *supra* note 141, at 64. Currently, teleconferencing as a substitute for physical appearances of out-of-state attorneys is often used by judges seeking to contain costs. Cf. Joseph P. Fried, *TV Speeds Cases From Police to Prosecutor*, N.Y. TIMES, Mar. 28, 1995, at B4 (describing expanding use of live videoconferencing—as a substitute for face to face meetings—when police officers turn their cases over to prosecutors).

Bermant & Woods note that the capacity for "virtual" court appearances may have another result: "Doctrines of personal jurisdiction may finally be freed from the territorialism of the 19th Century, and 'venue' as a limitation on the power of the courts may disappear." Bermant & Woods, *supra* note 141, at 64.

¹⁴⁵ Bermant & Woods, *supra* note 141, at 64.

¹⁴⁶ See, e.g., Stevan Alburty, *It's a Buyer's Marketspace*, N.Y. TIMES, Mar. 20, 1995, at A17 (op-ed); see also David S. Bennahum, *Mr. Gingrich's Cyber-Revolution*, N.Y. TIMES, Jan. 17, 1995, at A19 (op-ed) (describing Rep. Gingrich's vision for cyberspace expansion as "a recipe for widening the gap between information haves and have-nots").

Bermant and Woods note other values and goals potentially threatened by innovative uses of technology to replace traditional court appearances: authenticity (erosion of tangible sense of judicial power), legitimacy, dignity (loss of effectiveness of symbolic aspects of formality of courts), control (some power would necessarily be ceded to the technical staff), due process, and job satisfaction (judge's loss of personal contact with parties). Bermant &

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Increased dependence on computers and associated technology in litigation must be accompanied by programs that provide schools and libraries with computers and access to online services and adequate instruction and assistance on their use.

d. *Some Concluding Thoughts*

Our point in describing these devices is to demonstrate that with the right tools, complex disputes that should remain in the courts remain there. The existing tools, however, are being stretched to their limits.

Procedural and substantive law must be updated, more than it has been, to reflect changes in the ways in which the world does business. It is plain common sense that, given the nationalization of markets, more people, spread over a larger geographic region, are likely to be hurt if a product proves defective. Yet current personal jurisdiction limits ignore the reality of national markets.¹⁴⁷ It is stuck in a horse and buggy—or perhaps Volkswagen—at a time when people—and products—routinely move in planes.¹⁴⁸ Protection of the public through administrative agencies and compensation through a health and security system offer a better alternative to the tort system.¹⁴⁹

B. *Expense and Delay*

In comparison to traditional litigation, ADR is said to require less time to achieve a disposition, to cost less and to result in substantively better outcomes (since all parties will find the resolution at least mildly acceptable).¹⁵⁰ Other aspects of its superiority are said to be its ability to tap

Woods, *supra* note 14, at 67.

¹⁴⁷ See *In re DES Cases* (Ashley v. Abbott Laboratories), 789 F. Supp. 552, 571–73 (E.D.N.Y. 1992); *id.* at 576 (“[W]here substantive law has undergone significant development to accommodate socioeconomic change, it is necessary to interpret jurisdictional law so that it meets the demands of the subject matter of the jurisdiction.”); Julia Christine Bunting, *Ashley v. Abbot Laboratories: Reconfiguring the Personal Jurisdiction Analysis in Mass Tort Litigation*, 47 VAND. L. REV. 189, 223 (1994) (“In eliminating the minimum contacts requirement from its jurisdictional analysis, the Ashley court acknowledged that territorial-based contacts analysis does not reflect modern social and economic activity.”); Sheila L. Birnbaum & Gary E. Crawford, *Jurisdiction Ruling Charts New Course*, NAT’L L.J., June 22, 1992, at 18 (discussing *Ashley*); See Redish & Beste, *supra* note 113.

¹⁴⁸ See Acohido, *supra* note 32, at E1 (describing the boom in air freight to transport products).

¹⁴⁹ WEINSTEIN, *INDIVIDUAL JUSTICE*, *supra* note 2, at 163–71.

¹⁵⁰ See, e.g., Kenneth R. Feinberg, *Mediation is a Cost-Efficient, Timely Way to Avoid*

experts as dispute resolvers in the substantive field of the dispute, and the ability of the parties to include "intangibles" in the resolution.¹⁵¹

With respect to ADR's cost and delay-reducing potential, the actual benefits of ADR, and court-annexed programs in particular, are not clear given a lack of empirical data.¹⁵² Delay in the courts is a problem,¹⁵³ although one that has been somewhat overstated.¹⁵⁴ There is some evidence that ADR programs in some instances may even increase the cost and delay.¹⁵⁵ A higher than expected percentage of parties that have participated in the federal courts' mandatory arbitration programs have subsequently sought trial de novo.¹⁵⁶ Two ongoing studies—one by RAND and one by

Litigation, L.A. TIMES, Mar. 26, 1995, at B-9 (suggesting use of mediation in Orange County controversy); Debra C. Moss, *Reformers Tout ADR Programs*, A.B.A. J., Aug. 1994, at 28 (discussing delay reduction in Western District of Missouri's early assessment program). On benefits of ADR, see generally J. Michael Keating, Jr., CPR Institute for Dispute Resolution, *Getting Reluctant Parties to Mediate*, ALTERNATIVES, Jan. 1995, at 9, 10 (privacy, timeliness, reduction of transaction cost, better understanding of the case); CPR LEGAL PROGRAM, NATIONAL FRANCHISE MEDIATION PROGRAM 3 (1993) (savings in legal fees and other litigation expenses, promptness of resolution, preservation of business relationships, creative, business-driven results, privacy and confidentiality). *But see* Galanter & Cahill, *supra* note 16 (settled resolutions are not necessarily substantively better than litigated ones).

¹⁵¹ See Carrie J. Menkel-Meadow, *Judicial Referral to ADR: Issues and Problems Faced by Judges*, FJC DIRECTIONS, Dec. 1994, at 8, 11; cf. Daragahi, *supra* note 82, at 5 (describing growth of panels of experts familiar with environmental legal issues).

¹⁵² See Dayton, *supra* note 2, at 916 (using multivariate analysis to conclude that "claims concerning ADR's potential to reduce costs and delays are greatly exaggerated"); Editorial, *Mandatory ADR: Can We Talk*, 78 JUDICATURE 272, 272 (1995) (noting lack of empirical support for some claims about ADR). The lack of empirical data examining the phenomenon is widely bemoaned; cf. WOOLF REPORT, *supra* note 2, at 141 ("Arbitration is, however, often criticized as being no quicker or cheaper than litigation because it has become over-dominated by court procedures."). See, e.g., Deborah R. Hensler, *Why We Don't Know More About the Civil Justice System—and What We Could Do About It*, U.S.C. LAW, Fall 1994, at 10 (lack of institutional structure to support sustained empirical research into the civil justice system).

¹⁵³ See generally BAKER, *supra* note 90 (discussing delay in the federal courts of appeals and proposals to accommodate the volume of cases).

¹⁵⁴ Cf. discussion of litigation explosion, *supra* notes 90-92 and accompanying text.

¹⁵⁵ See Stienstra & Willging, *Alternatives*, *supra* note 2, at 31.

¹⁵⁶ *Id.* (requests were made in 60% of cases). Whether the arbitration was successful will effect participant attorneys' perceptions of the cost saving. An earlier report indicated that attorneys in cases that were successfully arbitrated thought that there were costs savings, while those for whom arbitration was not successful found none, but still felt the costs were "reasonable." Barbara S. Meierhoefer, *Court-Annexed Arbitration in Ten District Courts*

the Federal Judicial Center—will soon aid in evaluating such programs.¹⁵⁷

C. Disaffection with the "Adversarial" Model

Those who criticize traditional litigation have a narrow view of what it has been, and what it can be. ADR, with its focus on problem-solving tactics, is often posited as the opposite of litigation, with its assumption and exploitation of the parties' presumed pursuit of self-interest.¹⁵⁸ The involved "facilitator" in ADR is said to be the opposite of the detached "umpire" in litigation.

The dichotomy in the literature and in public policy discussions that is set up with ADR on the one side and traditional litigation on the other is largely false.¹⁵⁹ In practice, most traditional litigation is not text-book "adversarial" litigation. It has more in common with the purportedly gentler alternative dispute resolution forms.¹⁶⁰

(Federal Judicial Center 1990), at 93.

¹⁵⁷ See Moss, *supra* note 150, at 30. One report, to be written by the Federal Judicial Center, will study five districts including the Northern District of California and the Western District of Missouri. The other, to be conducted by the RAND's Institute for Civil Justice, will study 10,000 cases in 10 pilot and control districts.

¹⁵⁸ See, e.g., Paul T. Wangerin, *The Political and Economic Roots of the "Adversary System" of Justice and "Alternative Dispute Resolution"*, 9 OHIO ST. J. ON DISP. RESOL. 203, 203-06 & nn.1-13 (1994); Michel Rosenfeld, *The Transformation of the Attorney-Client Privilege: In Search of An Ideological Reconciliation of Individualism, The Adversary System, and the Corporate Client's SEC Disclosure Obligations*, 33 HASTINGS L.J. 495, 503 (1982); see also Stienstra & Willging, *Alternatives*, *supra* note 2, at 14 (noting "winner take all" nature of litigation).

¹⁵⁹ See Galanter, *supra* note 16, at xiii.

Most ADR is not located in autonomous institutions that operate independently of the norms and sanctions of the legal system. Instead ADR is typically situated near legal institutions and dependent upon legal norms and sanctions. Correspondingly, most of what goes [on] in and around courts is not 'traditional litigation' if that means the decisive application of legal norms to fully presented cases. Instead we find maneuvering, bargaining, and (often) mediation in the shadow of possible adjudication — and the expense and risk of obtaining it. That ADR and adjudication reside in distinct normative worlds is a persistent element in a mythology of the partisans of each, in spite of ample evidence of the pervasive continuities.

Id.

¹⁶⁰ See, e.g., Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1543-44 (1992).

Especially since the revisions of Rule 16, judges, or their surrogates (special masters, magistrate judges and the like), have had to take on an active role in assisting the parties settle their disputes. Along the way, traditional litigation has picked up some of the attributes commonly associated with ADR.

The United States is not alone in moving towards a model of litigation that encourages settlement. A recent report prepared by Lord Woolf analyzing the current rules and procedures of the civil courts in England and Wales concluded that "the philosophy of litigation should be primarily to encourage early settlement of disputes."¹⁶¹

1. Judges

There has been, and must continue to be, a shift from the traditional Anglo-American jurisprudential view that the common-law judge is an oracle on high, muffled in the black robe of anonymity, uttering the law and deciding the facts without involvement.¹⁶² Despite some theoretical and practical objections to an active role by trial judges,¹⁶³ the court has an obligation to the integrity of the process itself—under the Federal Rules as well as the current practice—that requires active and direct involvement.¹⁶⁴

¹⁶¹ WOOLF REPORT, *supra* note 2, at 5; *see id.* at 20 (importance of keeping parties informed throughout the proceeding of the costs and "any alternative means of resolving" their conflict). *But see* Galanter & Cahill, *supra* note 16 (suggesting that settled resolutions are not necessarily superior to litigated ones).

¹⁶² *See* Susan M. Gabriel, *Judicial Participation in Settlement: Pattern, Practice, and Ethics*, 4 OHIO ST. J. ON DISP. RESOL. 81 (1988); Adams, *supra* note 99, at 442-43 & n.101 (noting changing perceptions of judicial role); Hogan, *supra* note 35, at 430-35; Susan K. Antalovich, Note, *Heileman Brewing Co. Inc. v. Joseph Oat Corporation: Defining the Perimeters of Judicial Involvement in the Settlement Process*, 5 OHIO ST. J. ON DISP. RESOL. 115, 115-18 (1989).

¹⁶³ *See* Gabriel, *supra* note 162; Hogan, *supra* note 35, at 115-18 (summary of some of the objections to an active judicial role); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982) (broad critique of rise of "managerial" judging and analysis of potential for erosion of procedural safeguards); Warshawsky, *supra* note 17 (description of potential for judicial coercion and other ethical problems); Antalovich, *supra* note 162, at 136 (description of potential coerciveness of judicial involvement in settlement); Gabriel, *supra* note 17, at 81-82, 89-95 (identification of some ethical problems of judicial involvement in settlement).

¹⁶⁴ "[T]he advent of 'managerial judging' can be characterized as a form of ADR in which judges attempt to preside over the negotiation and settlement of a case through efforts at moral suasion backed by the possible use of adjudicatory power." Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 673 (1993). Asked about whether "ADR

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The notion of the judge as a detached umpire impassively speaking out the law as needed does not mesh with the reality of judges' participation. The amendments to Rule 16 anticipate the judge's active intervention, either directly or through surrogates, to push the case to trial or settlement.¹⁶⁵ Moreover, intervention may be required to fulfill the courts' "equalizing" role; the judge is the instrument through which that aspect of the courts' work is exercised—any redress of imbalances depends on the judge's initiative to perceive and rectify them.¹⁶⁶

This activist role is especially critical in the class action context. There it has been said the court is a "fiduciary for the absent class and the ultimate guardian of its interests."¹⁶⁷ The number of "clients" may be extremely large, the class members may be widely scattered and individual members may have little or no contact with their attorneys, and little ability to monitor actions lawyers may take binding some or all class members.¹⁶⁸ In the absence of involved plaintiffs, it falls to the judge to ensure that class counsel have the capacity and the will to do the job, and that any settlement achieved is "fair, reasonable and adequate."¹⁶⁹

The judge must also be attentive to—and ready to act on behalf of—the interests of the larger community of nonlitigants who will be impacted by a settlement or other resolution.¹⁷⁰ The court may convene public hearings to ensure that those forging the settlement are aware of, and take into account, the needs of family members, neighbors, community resource providers and

procedures should be used by federal courts in civil cases because in some cases they produce fairer outcomes than traditional litigation," 52.7% of "All Circuit Judges" agreed and 29.7% disagreed. *See Oct. 1992 Survey of Federal Judges*, *supra* note 94, at 21.

¹⁶⁵ Rule 16 implies early intervention by the court in "facilitating the settlement of the case." FED. R. CIV. P. 16(a) (5). *See generally* William L. Adams, *Let's Make a Deal: Effective Utilization of Judicial Settlements in State and Federal Courts*, 72 OR. L. REV. 427, 430-35 (1993) (describing history of amendments to Rule 16).

¹⁶⁶ *See supra* notes 162-65 and accompanying text.

¹⁶⁷ *See Lazos, supra* note 2, at 320 & n.71. Lazos suggests that inherent conflicts of interest between the class and its representatives are inherently so severe in relation to their relative enthusiasm for settlement that the courts should supplement their oversight functions by appointing a guardian ad litem for absent class members, pursuant to a proposed modification to Rule 23. *Id.*

¹⁶⁸ *See generally* WEINSTEIN, *INDIVIDUAL JUSTICE*, *supra* note 2, at 39-121. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1994); Michael D. Ricciuti, Note, *Equity and Accountability in the Reform of Settlement Procedures in Mass Tort Cases: The Ethical Duty to Consult*, 1 GEO. J. LEGAL ETHICS 817 (1988).

¹⁶⁹ *See, e.g., In re Joint E. & S. Dist. Asbestos Litig.*, 878 F. Supp. 473, at 566 (E.D.N.Y. 1995) (reviewing adequacy of stipulated settlement in Manville trust litigation).

¹⁷⁰ *See generally* WEINSTEIN, *INDIVIDUAL JUSTICE*, *supra* note 2, at 92-101.

others affected by plaintiff's injuries.

The "detached umpire" model does not mesh with the reality of the judge's mental processes. Far from maintaining a *tabula rasa*, the judge develops opinions about the case at different stages of the litigation. He or she continually estimates the strength of the case, the competence of the attorneys and the time required for a resolution. The judge must make these assessments to fulfill his or her obligations under Rule 16 to move the case to trial or settlement.¹⁷¹ The fact that formal "pronouncements" are rare and unmistakable, in the context of the extended give-and-take of the pretrial process, does not mean that the judge is mentally detached and uninvolved.

2. Lawyers

The adversarial litigation model assumes—and is said to depend on—the self-interest of the parties and the lawyers who represent them.¹⁷² Under the ideal, truth is the elusive goal that emerges from a clash of single-minded zealous advocates.¹⁷³

Some attorneys do fit the model, but many do not. Attorneys, and the parties they represent, are capable of compromising their interests to some degree in pursuit of larger social welfare. This is true even in the heat of litigation, even from vigorously partisan players.

Lawyers often welcome the opportunity to make a contribution beyond the bottom line.¹⁷⁴ Witness the malaise of many law students and lawyers new to the profession.¹⁷⁵ Many of them do not relish the idea of devoting

¹⁷¹ This aspect of the judge's involvement is critical in the class action contexts, where decisions must be made at various stages—whether or not to certify the class; whether notice of an event in the class action's prosecution must be distributed to the class—that tacitly implicate the judge's sense of the merits of the case and its future direction. See generally Jack B. Weinstein & Karin S. Schwartz, *Notes from the Cave: Some Problems of Judges in Dealing with Class Action Settlements*, 163 F.R.D. 369 (1995).

¹⁷² See *supra* note 158 and accompanying text (models of the adversarial system).

¹⁷³ See Rosenfeld, *supra* note 158, at 503–04. Compare the following general policy of the Assoc. of the Bar of the City of New York, *Alternatives for Resolving Disputes*, 44TH STREET NOTES, Apr. 1996, at 2 ("Each practicing member of this Association should be knowledgeable about alternative dispute resolution processes, and should advise the member's clients of the availability of any appropriate alternatives to litigation so such clients can make an informed choice concerning resolution of present and prospective disputes."). See also Yaroslav Sochynsky, *How to Approach a Client About Mediation*, N.Y. L.J. Sept. 7, 1995, at 3.

¹⁷⁴ Cf. Tobin Harshaw, *Making Lawyers Useful*, N.Y. REV. BOOKS, Dec. 25, 1994 (enthusiasm of law students for "problemsolving" mode of dispute resolution).

¹⁷⁵ Cf. Terrell & Wildman, *supra* note 39.

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their lives to dealing with clients whose interests may be petty and selfish.

Perhaps the most radical departure from the traditional adversarial model is the use of the "settlement class action." In a settlement class action, the class action complaint is filed together with its proposed resolution. This was the device that was used in the *Manville Trust* and the breast implant litigation. It requires substantial communication and consensus-building between the adversaries—possibly with the involvement of court personnel—before they formally file dispositive papers. The judge still must review the merits of the class action according to the traditional criteria specified in Rule 23. It is essential to ensure that any settlement approved is not the product of collusion favoring the defendant and attorneys at the expense of the class.¹⁷⁶

3. Parties

There is the tendency to conceive of plaintiffs in traditional litigation, like their attorneys, as mired in a single-minded pursuit of a money judgment. This characterization denigrates the complex economic, psychological and personal reasons that bring plaintiffs into court. Sometimes the public airing of a grievance, or receipt of a public apology from a corporate malefactor, is as important to a plaintiff as a cash sum.¹⁷⁷ A plaintiff may also see the court process as a way to ensure that others do not suffer the same misfortune. In any case, altruism may intermingle with a desire for vindication, retribution and the cleansing effect of a public hearing.

These are goals that can often be achieved more readily through court supervised settlement than through extrajudicial dispute resolution. The question remains, does our litigation system encourage recognition of the kinds of dynamics that are at work? Are parties encouraged through the litigation culture to take stronger positions than they feel, and to devalue other forms of satisfaction in favor of a winner-take-all mindset?

D. Decisionmakers Who Lack Specialized Knowledge in the Area of the Dispute

In many forms of alternative dispute resolution, the "dispute resolver" is a person or body who is already familiar with the substantive area of the dispute. For example, the coordinator of the Eastern District of New York's ADR programs maintains lists of attorneys expert in various subject matters

¹⁷⁶ See, e.g., *Judge Rejects Accord Over Ford's Bronco*, N.Y. TIMES, Mar. 25, 1995, at A7.

¹⁷⁷ WEINSTEIN, *INDIVIDUAL JUSTICE*, *supra* note 2, at 46.

that can be tapped as "neutral evaluators" in the district's Early Neutral Evaluation program.¹⁷⁸

Judges usually begin a litigation in a highly technical area with only a general familiarity with the particulars of the industry involved in a dispute, possibly supplemented by attendance at conferences or seminars.¹⁷⁹ But judges may draw on a variety of resources to accommodate the technical subject matter of a dispute.

In a complex litigation, where the judge must develop a sophisticated understanding of the issues to perform the judicial functions properly, the parties can be asked to provide experts to educate the judge about the technical issues at stake.¹⁸⁰ The author has used this procedure in a wide variety of cases, including a DES case where the causal relationship between the drug and some of plaintiffs' injuries is disputed. Such conferences are useful to the parties as well as the judge; they provide dry runs for the parties, who ultimately bear the burden of ensuring that a jury of laypersons will understand the technical aspects of this case.

Judges may use the power to appoint a special master¹⁸¹ to bring already-developed skills into the dispute. In choosing a special master, considerations which may be important are the person's political, technical, economic, and social background which may be relevant; his or her sophistication with respect to mediation and other forms of ADR, if the appointment is to facilitate settlement; his or her knowledge of the substantive area of law at the basis of the dispute; and his or her expertise in a particular scientific area.¹⁸² In addition to formally appointed special masters, a judge may rely on *amicus curiae*, such as governmental and

¹⁷⁸ See UNITED STATES DISTRICT COURT, DISPUTE RESOLUTION PROCEDURES IN THE EASTERN DISTRICT OF NEW YORK at 7 (1992). See Report of ADR Administrator, Sept. 19, 1995, on the results of Compulsory Mediation in the U.S. Dist. Ct. for the East. Dist. of New York, Sept. 19, 1995.

¹⁷⁹ See Jack B. Weinstein, *Limits on Judges Learning, Speaking and Acting—Part I—Tentative First Thoughts: How May Judges Learn?*, 36 ARIZ. L. REV. 539 (1994).

¹⁸⁰ See WEINSTEIN, *INDIVIDUAL JUSTICE*, *supra* note 2 (describing this technique).

¹⁸¹ See *supra* notes 162-65 and accompanying text. See also Kenneth R. Feinberg, *Creative Use of ADR: The Court Appointed Special Master*, 59 ALB. L. REV. 881 (1996). Regularization of the mediator's ethical role is critical to this development. See, e.g., Irene Stanley Said, *The Mediator's Dilemma: The Legal Requirements Exception to Confidentiality Under the Texas ADR Statute*, 365 TEX. L. REV. 579 (1995).

¹⁸² See generally Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication*, 53 U. CHI. L. REV. 394 (1986); Margaret G. Farrell, *Coping With Scientific Evidence: The Use of Special Masters*, 43 EMORY L.J. 927 (1994); Margaret G. Farrell, *The Role of Special Masters in Federal Litigation*, 842 ALI-ABA 931 (Oct. 14, 1993).

public interest bodies, to bring technical issues into sharp relief.

Rule 706 of the Federal Rules of Evidence provides additional authority for bringing expertise into the courtroom.¹⁸³ The author has used expert panels in a broad array of civil and criminal cases—most recently, to project the number of future asbestos claimants against the Manville Trust¹⁸⁴ and to provide a “neutral evaluation” of expert statistical reports submitted by the government and the defendant in a drug courier case.¹⁸⁵ Rule 706 is an underutilized tool; its use is hampered by the difficulty that trial judges encounter in attempting to identify reliable experts and in securing compensation to pay for them.¹⁸⁶ An effort is underway to educate judges about the procedure and to develop a central resource to which judges can refer for assistance in locating experts.¹⁸⁷

E. Insensitivity to Significance of Nonmonetary Intangibles to the Litigants

An advantage of many forms of ADR over court adjudication is said to be their ability to bring nonmonetary “intangibles” into the resolution of a dispute. As already indicated, plaintiffs often are motivated by factors other than the potential for monetary damages or the narrow forms of injunctive relief that the courts may award. Many forms of ADR permit exploration of creative resolutions not related to the bottom cash line that incorporate intangibles such as public recognition of the plaintiff, a public apology by the defendant, or some other vindication of a party’s moral position.¹⁸⁸

¹⁸³ See generally Joe S. Cecil & Thomas E. Willging, *Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence* (Federal Judicial Center 1993), at 706.

¹⁸⁴ See *In re Joint E. & S. Dist. Asbestos Litig.*, 878 F. Supp. 473 (E. & S.D.N.Y. 1995).

¹⁸⁵ *United States v. Shonubi*, 895 F. Supp. 460 (E.D.N.Y. 1995). The problem in *Shonubi* was how to project the amount of drugs carried in course of eight trips based on the known quantity carried on the day the defendant was intercepted and profiles of other intercepted drug couriers. *Id.*

¹⁸⁶ See Cecil & Willging, *supra* note 183, at 21–22. Courts are reluctant to impose such costs on the parties. See *id.* at 22, 57–65.

¹⁸⁷ Weinstein, *Lesson*, *supra* note 2.

¹⁸⁸ See Stienstra & Willging, *Alternatives*, *supra* note 2, at 14 (reviewing traditional argument that “[i]nstead of adjudication’s ‘winner take all’ outcome . . . mediation permits parties to fashion more creative and mutually satisfactory outcomes”). See, e.g., Andrew Pollack, *Japanese Suits on H.I.V.-Tainted Blood Settled*, N.Y. TIMES, Mar. 15, 1996, at A31 (plaintiffs received apologies from blood product distributor. “Some plaintiffs have said they wanted apologies from the government and the companies as much as they wanted

Recall the custom in parts of Asia for the chairman of airline companies to apologize publicly and offer full compensation to the victims and their families following an airplane crash.¹⁸⁹

Consideration of such intangibles should and can be a greater part of the court process, especially the court-supervised settlement process. Pursuit of settlement is now recognized as an appropriate function of the courts.¹⁹⁰ It must be accompanied by an increased sensitivity to the diverse reasons that propel plaintiffs into court, and a commitment to develop creative solutions that respond to underlying human concerns.

IV. NON-TRADITIONAL DISPUTE RESOLUTION

A. Court-Annexed Programs

The Civil Justice Reform Act of 1990 requires each district court to study its caseload and to consider ADR in designing its civil justice expense and delay reduction plan.¹⁹¹ The Eastern District of New York implemented its Civil Justice Expense and Delay Reduction Plan in 1991. This District

compensation." The government of Japan paid forty-four percent of costs.).

¹⁸⁹ *South Korean Plane Crashes in Storm; 66 Reported Killed*, N.Y. TIMES, July 27, 1993, at A6; see also *JAS Officials to Be Punished for Crash*, Japan Transportation Scan, Apr. 26, 1993 (public apology by Japanese Transit Minister, Ihei Ochi, "to the Japanese people" following crash of JAS DC-9).

¹⁹⁰ See *supra* part IV. C.

¹⁹¹ 28 U.S.C. § 471 *et seq.* (creation of civil justice expense and delay reduction plans); 28 U.S.C. § 473(a)(6) (consideration of ADR). ADR is only one of six "principles and guidelines of litigation management and cost and delay reduction" that the district courts are required to consider. The other factors include: "systematic, differential treatment of civil cases" according to their complexity; "early and ongoing control of the pretrial process through the involvement of a judicial officer" in assessing the case, controlling discovery and setting motion deadlines and early, firm trial dates; series of conferences to explore the parties' receptivity to settlement, to help frame the issues and to manage discovery; encouragement of cooperative discovery devices; and imposition of certification requirements of each party's good faith effort to reach agreement on matters set forth in discovery motions. See 28 U.S.C. § 473(a) (1)-(5).

State legislatures and courts are also embracing ADR. According to the 1993 report of the National Institute for Dispute Resolution, "26 states and the District of Columbia are now exploring or adopting ways by which local courts can routinely offer a range of dispute resolution tools to settle most disputes that come before them." Chief Judge Judith S. Kaye, Project Statement (on file). See also *Today's News Update*, N.Y. L.J., Sept. 6, 1995 (private mediation group submitted plan for court-annexed family and divorce mediation requiring all judges to inform litigants of availability of voluntary mediation services).

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had previously implemented a mandatory arbitration program in 1986 on its own initiative, based on a successful Philadelphia plan. Upon filing the complaint, each party is provided with a booklet detailing the district's alternative dispute resolution procedures.¹⁹² The program is coordinated by a full-time staff lawyer in the clerk's office.

The Eastern District plan adds three ADR techniques to those already provided for in the Federal Rules of Civil Procedure and under other authority:¹⁹³ court-annexed mandatory arbitration for cases in which the amount in controversy does not exceed \$100,000;¹⁹⁴ early neutral evaluation (ENE);¹⁹⁵ and court-annexed mediation.¹⁹⁶ In all cases, the parties' rights to an adjudication before an Article III judge are preserved. The results of the arbitration, mediation, or evaluation, or the reason a pro se panel attorney turns down a case, remain confidential—even the judge is

¹⁹² See UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, DISPUTE RESOLUTION PROCEDURES IN THE EASTERN DISTRICT OF NEW YORK (1992) [hereinafter EDNY ADR GUIDE].

¹⁹³ These include consent to jury or court trial before a magistrate judge, 28 U.S.C. § 636(c), FED. R. CIV. P. 16(c)(6), 73 & 76; settlement conferences conducted by a judge or magistrate judge, FED. R. CIV. P. 16(a)(5) & c (7); use of special masters, FED. R. CIV. P. 16(c) (6) & 53, and 28 U.S.C. § 636(b)(2) (magistrate judge as special master).

¹⁹⁴ Arbitration is mandatory in all civil cases in which the amount in controversy does not exceed \$100,000, subject to certain exclusions including social security, tax and prisoners' civil rights claims and cases seeking equitable relief. Arbitrators are chosen randomly, although where possible the program selects those who have experience in the substantive field. See EDNY ADR GUIDE, *supra* note 192.

¹⁹⁵ ENE is a "confidential, non-binding conference where the parties . . . and their counsel present the factual and legal bases of their case to one another and to an experienced and impartial attorney with expertise in the subject matter of the case." Cases, which must exceed \$100,000 in damages sought, are designated for ADR by either a magistrate or a judge. The evaluator provides a nonbinding estimate of the liability and a range of damages, attempts to identify areas of agreement and those that require resolution, and assesses the strengths and weaknesses of each side's case. EDNY ADR GUIDE, *supra* note 192, at 5-6.

¹⁹⁶ Mediation occurs only by consent of the parties. Litigants are offered an option of choosing their mediator from the Court's panel, selecting a mediator on their own, or seeking the assistance of a reputable neutral ADR organization. A mediator drawn from the court's panel will generally have expertise in the area of law that is the subject matter of the case. The mediator does not impose a judgement on the parties but rather seeks to help the litigants consensually resolve their litigation. Fees for mediation are the responsibility of the parties. EDNY ADR GUIDE, *supra* note 192, at 9-10. Still other forms of court-annexed ADR include the "mini-trial" and the "summary jury trial." See generally Holly Bakke & Maureen Solomon, *Alternative Dispute Resolution: Selecting the Appropriate ADR Technique*, COURT ADMINISTRATION BULL., Aug. 1994, at 2-3; Haig & Caley, *supra* note 14.

informed.

It is difficult to evaluate the benefits and drawbacks of the Eastern District's court-annexed ADR. Referral to arbitration is mandatory and automatic for cases worth less than \$100,000.¹⁹⁷ When arbitration is successful, the case disappears from the assigned judge's docket. The empirical data available suggest that cases referred to mandatory arbitration, to ENE, or to mediation, tend to settle, and that less time is required for a resolution.¹⁹⁸ Whether that is due to the nature of the cases referred, or to the effectiveness of our ADR program, is not certain. The author's intuition is that most would have settled without court intervention—though somewhat more slowly. A “voluntary” instead of “compulsory” system,¹⁹⁹ with available review by an Article III judge, either of any settlement, or, in the context of binding arbitration, of the informed nature and voluntariness of the decision to enter into arbitration, is particularly useful. Care must be taken that a compulsory system does not erode the parties' rights to a jury trial.²⁰⁰

A reflection of the emphasis on settlement is the court-sponsored “settlement week.” The United States District Court for the Western District of New York experimented with such a program,²⁰¹ which was reminiscent of earlier emphasis in many federal courts on intensive settlement periods. No trials were held while “experienced members of the federal bar” attempted to assist the parties in one hundred “carefully selected cases” to reach settlement.²⁰² Parties were ordered by the court to send someone with full authority to settle the case to the mediation session.²⁰³

¹⁹⁷ See EDNY ADR GUIDE, *supra* note 192, at 4.

¹⁹⁸ Roughly 90% of cases designated for mandatory arbitration have settled—many before the arbitration hearing took place. *ADR in the Eastern and Southern Districts*, FEDERAL BAR COUNCIL NEWS, Dec. 1994, at 9–10. Roughly half of those cases that completed ENE have settled. *Id.* Of ten ENE mediations conducted under the district's mediation program, seven have settled. *Id.*

¹⁹⁹ Cf. WOOLF REPORT, *supra* note 2, at 136, 143 (advocating voluntary rather than compulsory ADR programs in context of reform of English and Welsh civil justice systems); See generally Editorial, *Mandatory ADR; Can We Talk*, 78 JUDICATURE 272 (1995).

²⁰⁰ Cf. WOOLF REPORT, *supra* note 2, at 136 (“I do not think it would be right in principle to erode the citizen's existing entitlement to seek a remedy from the civil courts, in relation either to private rights or to the breach by a public body of its duties to the public as a whole.”).

²⁰¹ *Federal Court Plans Fall 1995 Settlement Week*, N.Y.S. BAR J., July–Aug. 1995, at 50.

²⁰² *Id.*

²⁰³ *Id.*

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Theoretically, privatization of court-annexed functions—by contracting them out to a private dispute resolution provider—is possible.²⁰⁴ In response to the growing popularity of ADR, specialized private arbitration-mediation services—both profit and non-profit—have emerged.²⁰⁵ With consent of the parties, a court could refer a case to a private dispute resolution provider. It would then be important for the court to retain some ability to review any settlement reached and any agreement to seal documents in order to satisfy its responsibilities as an “equalizer” of parties with resource imbalances, to assure the settlement was not coercive, and to protect the public interest in the case.²⁰⁶ Courts can also serve as clearing houses for information about private services without endorsing particular forms or providers.²⁰⁷

If private arbitrators and mediators are to be entrusted with resolving disputes that implicate broad social issues, then they cannot take a narrow and parochial view with respect to their responsibilities.²⁰⁸ Arbitrators in

²⁰⁴ See William K. Slate II, *Court-Annexed ADR Systems*, N.Y.L.J., Jan. 5, 1995, at 3 (advocating privatization of court-annexed mediation, and diversion of “a significant number of large, time-consuming cases” to existing dispute resolution providers); WOOLF REPORT, *supra* note 2, at 143 (advocating use of existing private dispute resolution facilities rather than development of a new system of court-annexed ADR); Harold Baer, Jr., *Mediation—Now is the Time*, LITIG., Summer 1995, at 5.

²⁰⁵ See, e.g., advertisement for JAMS/ENDISPUTE, a new private ADR services provider, N.Y. L.J., Oct. 21, 1994, at 3. Martindale-Hubbell recently published its first dispute resolution directory, which lists more than 60,000 professionals—judges, attorneys, law firms and other experts—involved in dispute resolution. CPR INSTITUTE FOR DISPUTE RESOLUTION, *Martindale-Hubbell Publishes Dispute Resolution Directory*, ALTERNATIVES TO THE HIGH COSTS OF LITIGATION, Jan. 1995, at 3; see generally Section of Dispute Resolution of the Public Services Division Governmental Affairs Group, American Bar Association, *1993 Dispute Resolution Program Directory* (302-page book listing community dispute resolution facilities).

Nonprofit agencies devoted to research and education on the benefits of ADR have also emerged. For example, the CPR Institute for Dispute Resolution, a nonprofit agency, publishes *Alternatives to the High Costs of Litigation*. The CPR Institute pioneered “taking the pledge,” an effort to sign up many corporations to a statement of principles that up-front in any dispute they would suggest and/or try ADR. See Letter from Edwin J. Wesely to the Hon. Jack B. Weinstein (Dec. 27, 1994) (on file with author). CPR’s “Judicial Project” seeks to provide ADR information, technical assistance and training to federal and state courts in relation to the 1990 CJRA.

²⁰⁶ See PROPOSED LONG RANGE PLAN, *supra* note 2, at 66 (need for judicial oversight of referral of cases to private dispute resolvers).

²⁰⁷ See Stienstra & Willging, *Alternatives*, *supra* note 2, at 50; WOOLF REPORT, *supra* note 2, at 21.

²⁰⁸ Cf. Carrie Menkel-Meadow, *Professional Responsibility for Third-Party Neutrals*,

significant cases should not look at themselves as nuts-and-bolts technicians, but rather as public servants with broad social responsibilities—in practical effect, as judges. A great strength of this country has been its sense of responsibility to communities—partly because we have had enough assets and have had more resources to distribute than other countries.

B. *Residual Disputes Following Settlement*

Somewhere between court-annexed and private ADR is the incorporation of arbitration and mediation provisions in court-approved settlements. For example, the settlement of the *Manville Trust* litigation provides that disputes between the Trust and asbestos health claimants are to be resolved by binding or non-binding arbitration. Only after a multi-step process of dispute resolution has been completed may the claimant exit to the court system.²⁰⁹ In some class action settlements, the stipulated settlement specifies the total amount to be contributed to a victims' compensation fund but leaves to ADR the allocation of individual co-defendants' contributions.²¹⁰

C. *Repetitive Commercial Litigation*

The cutting edge of ADR may be the development of intra-industry ADR treaties. Under a typical agreement, all signatories consent to try ADR before resorting to litigation. The nation's biggest banks, the Chemical Manufacturers Association, and the Nonprescription Drug Manufacturers Association, are currently considering adopting such treaties.²¹¹ Intra-industry agreements have already been signed by insurance, food and commercial inventory finance businesses.²¹² Courts appear willing to broadly construe industry arbitration regulations.²¹³

ALTERNATIVES TO THE HIGH COSTS OF LITIGATION, Sept. 1993, reprinted in JUDGE'S DESKBOOK, *supra* note 2, at 91.

²⁰⁹ See *In re Joint E. & S. Dist. Asbestos Litig.* (Findley v. Falise), 878 F. Supp. 473, 495, 581 (E. & S.D.N.Y. 1995).

²¹⁰ See, e.g., CPR Institute for Dispute Resolution, *Manufacturers Agree to Settlement Plan That Would Resolve Mass Tort Litigation*, ALTERNATIVES TO THE HIGH COSTS OF LITIGATION, Jan. 1995, at 3 (proposed creation of \$750 million settlement fund in *Beeman v. Shell Oil Co.*, with individual co-defendants' contributions to be determined by ADR).

²¹¹ Mike France, *More Big Businesses Ask: Can We Talk, Not Sue*, NAT'L L.J., Mar. 13, 1995, at B1.

²¹² *Id.*

²¹³ See, e.g., *McMahan Securities Co. v. Forum Capital Markets L.P.*, 35 F.3d 82, 88 (2d Cir. 1994) (citing "federal policy favoring arbitration," construes National Association of

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Such agreements do not raise the concerns implicated in large-scale privatization of justice.²¹⁴ Presumably both sides of the dispute are almost equally familiar with dispute-resolution facilities and their rights under the contract governing their relationship. Courts need not monitor the dispute to ensure that one side is not systemically exploited. The same types of disputes are likely to recur, only rarely implicating national policy. Preservation of an ongoing business relationship is at a premium, a factor to which ADR is said to be more sensitive than traditional litigation.

D. Bioethical Disputes

Some controversial, but essentially personal disputes, are probably better resolved privately. Here, the challenge is, institutionally, to support private decisionmaking. Consider the issue of whether or not to terminate life support, an issue on which we lack social consensus. This decision may best be made by the treating physician, the patient, and the patient's family and friends.²¹⁵ Recognizing that "thorny ethical issues are sometimes best tackled from within," many hospitals and other health care providers have created ethics committees or hired ethics consultants.²¹⁶ Encouraging private consensus-building and public debate over applicable national standards may be preferable to resorting to judge-made common law.

In highly technical areas, a judge may provide an impartial resolution, but not necessarily an "informed" one. Disputes over narrow and highly technical issues peculiar to a business community may best be resolved by an expert or a panel of experts drawn from within the area of specialty.

Complete privatization of dispute resolution, with possible appeal to the courts, may be desirable for business communities that are essentially self-regulating—i.e., those that have their own standards, guidelines, and enforcement mechanisms.²¹⁷ Of course, the courts may also draw on experts

Securities Dealers (N.A.S.D.) Code of Arbitration Procedure, which governs disputes between members and/or associated persons of the N.A.S.D. in relation to disputes arising "in connection with the [member's] business," broadly to cover employment disputes). See also Gregg A. Paradise, *Arbitration of Patent Infringement Disputes: Encouraging the Use of Arbitration Through Evidence Rules Reform*, 64 FORDHAM L. REV. 247 (1995).

²¹⁴ See *supra* part III.

²¹⁵ On the courts' involvement in bioethical disputes, see generally Nancy Neveloff Dubler, *Introduction: Bioethics and Alternative Dispute Resolution*, in *MEDIATING BIOETHICAL DISPUTES: A PRACTICAL GUIDE* 1 (1994).

²¹⁶ *Id.* at 4.

²¹⁷ See, e.g., Robert D. Cooter, *Decentralized Law for a Complex Economy*, 23 SW. U. L. REV. 443 (1994) (advocating decentralized lawmaking for the increasingly complex economy that respects norms developed by specialized business communities). Cooter points

from specific communities for a variety of functions, from special masters and Rule 706 experts in traditional litigation, to mediators and arbitrators in court-annexed ADR programs.²¹⁸

E. Administrative Agencies with Appropriate Court Review

Some issues that merit centralized decisionmaking are appropriately handled in the first instance by the administrative agencies with appropriate review by the courts.²¹⁹ The administrative agencies are particularly appropriate for high-volume repetitive disputes that are fact-intensive where the law is fairly settled, for example, in the social security,²²⁰ worker's compensation,²²¹ and landlord-tenant areas.²²² The possibility of review by an Article III trial court assures not only oversight of the decisionmaking practice but that legal issues needing greater public consideration will receive it.²²³ It seems doubtful that an appeal to a court of appeals is necessary, except on certification by the trial or appellate court.

F. Ombudspersons

Private and public ombudspersons schemes can help relieve the pressure on the courts without sacrificing the parties' rights to a public adjudication

to self-regulating professions, such as law and accounting, and "formal networks like Visa [that] promulgate their own rules."). *Id.* at 445.

²¹⁸ See *supra* note 180 and accompanying text.

²¹⁹ See PROPOSED LONG RANGE PLAN, *supra* note 2, at 33 ("Recommendation 10: Where constitutionally permissible, Congress should assign to administrative agencies or Article I courts the initial responsibility for adjudicating those categories of intensive federal benefit or regulatory cases that typically involve intensive fact-finding.").

²²⁰ See Jack B. Weinstein, *Equality and the Law: Social Security Disability Cases in the Federal Courts*, 35 SYRACUSE L. REV. 897, 906-15 (1984).

²²¹ See, e.g., N.Y. WORK. COMP. L. §§ 300.1-300.34 (1994).

²²² In New York, for example, the New York State Department of Housing and Community Renewal power extends to certain forms of disputes. See, e.g., *Powers Assocs. v. New York State*, 626 N.Y.S.2d 662 (Sup. Ct. 1995).

²²³ Recent initiatives to limit appellate review of administrative judges' decisions by Article III courts in Social Securities cases, for example, might be extremely detrimental to the defrauded. See Fretz & Zelenake, *supra* note 66, at 1262-63 ("If appellate jurisdiction is limited to discretionary review of legal issues, without the background an experience acquired through the review of individual cases, the important role played by the circuit courts in guiding the direction of national standards in the disability arena will be diminished."). Yet, a certification by either the trial or appellate court might suffice while reducing unnecessary appeals.

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by resolving disputes before they become full-blown. In his report on the English and Welsh civil justice systems, Lord Woolf advocated a government investigation into, and encouragement of increased ombudsperson schemes.²²⁴ He explained:

In addition to their obvious function of handling individual grievances, the ombudsmen, chiefly through the publication of annual reports, also have an important role in setting and maintaining standards of good practice within their specialist sectors. The courts, which have a broad general jurisdiction and do not share the ombudsmen's investigative powers, are less well equipped to take on functions of this kind.²²⁵

In Nassau County, for example, we have a comprehensive scheme of voluntary, trained ombudspersons for our adult and old age homes. They serve well in redressing and moderating disputes and tensions of families and clients.²²⁶

VI. ASPECTS OF CRIMINAL CASES

In considering ADR and the criminal law, our first question relates to the difference in receptivity to procedural innovation in civil and criminal cases. Here, we must ask, what is the basic dispute resolution technique from which we are departing?

1. *The Civil Case Model*

In civil cases, our model remains essentially litigations conducted according to the liberal federal rules developed in 1938. The merger of law and equity in 1938 resulted in a substantial loosening of traditional non-equity rules, and made it easier for plaintiffs to utilize our civil justice system. Debate over the future direction of civil procedure points to a procedural system that is fluid enough to accommodate society's eternal flux, but constant enough to provide some predictability of operation and fairness in individual cases.

Civil litigation has changed to reflect the increasing importance that we place on the continuity of business relationships and avoidance of

²²⁴ WOOLF REPORT, *supra* note 2, at 111, 137, 139-41.

²²⁵ *Id.*

²²⁶ Interview with Evelyn Weinstein, Director, Nassau County Ombudservice, August 20, 1995. *Cf.* WOOLF REPORT, *supra* note 2, at 140 (advocating for referral of cases and issues between "public ombudsmen" and the courts). *But see* Betty Rosenzweig, *Federal Budget Cuts Threaten Ombudservice*, GREAT NECK RECORD, Aug. 31, 1995, at 1.

psychological stress. The courts are no longer simply viewed as controlled forums for legal "jousting." A premium is placed instead on institutional support for facilitated communication. We see this sensitivity to psychology and to preserving relationships in the parallel movement to resolve matrimonial disputes in alternative fora. ADR reflects a pervasive illustration of how we are rethinking civil procedure. It reflects an imaginative response to new problems and a refusal to be bound by traditional techniques.

2. *The Criminal Case Model*

Criminal procedure has been much more static—perhaps because so much of it is influenced by constitutional requirements. The system begins with criminalization of certain activities, followed by indictment, prosecution, and prison if convicted. There are minor variations from this model, including imposition of fines and restitution. While the words have changed, the model has pretty much remained the same.

In criminal cases, we are seeing the effects of some movement towards greater rigidity and harshness in substantive law. Consider the popularity of "three strikes" laws, sentencing guidelines, and statutorily mandated minimum sentences. The country is relying upon more prisons, more prison time, and more fixed sentencing criteria. The current approach represents a significant abandonment of some innovations that reflected liberalization, such as release on the defendant's own recognizance in anticipation of dismissal and reliance on juvenile courts. It would seem as if the criminal and civil vessels of justice are passing in the night, going in opposite directions.

In fact, however, there is a great deal of alternate dispute resolution in criminal law since the vast bulk of cases are settled without trial. A large proportion of possible cases are resolved when the prosecutor declines prosecution, often with arrangements for restitution and "voluntary" compliance with tax or environmental laws.²²⁷ Once the prosecution is formally begun, plea agreements or arrangements for reduced sentences to circumvent the Guidelines under federal law are common.²²⁸ In jurisdictions like New York, where private criminal complaints are possible, mediation

²²⁷ Daragahi, *supra* note 82, at 5; J. Kevin Healy, *Making Environmental Mediation a Reality in New York*, N.Y.L.J., Feb. 6, 1995 at 1.

²²⁸ See *United States v. Aguilar*, 884 F. Supp. 88 (E.D.N.Y. 1995) (noting that, through practice of "sentence bargaining," an entire class of cases falls outside the Guidelines); U.S.S.G. § 5K1.1 (permitting sentence below Guidelines range when defendant cooperates with prosecution).

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programs have reduced the burden on the courts.²²⁹

One reason ADR in criminal cases has not received greater attention is that there is no one to speak for criminals and few to speak for particular victims. Corporations and litigants are well represented—consider the current dialogue in Washington over tort reform and environmental regulation. Those involved can force us to evaluate how well the system is working, to examine the costs and benefits, and to take a fresh look at the pragmatic devices needed to solve real problems.

There is no analogous substantive voice in the criminal law. The criminal bar, which benefits every time more repressive criminal legislation is passed,²³⁰ has not asked the practical questions about how to use our social resources appropriately to avoid unnecessary cruelties, nor has it produced cost-benefit analyses. The substantial advance in the civil area over the criminal area is largely due to the lack of political power and research and development in the latter.

Another reason for the rigidity in the criminal law is that the government can control it more readily. Criminalization and punishment has traditionally been considered a monopoly of the government. By contrast, it is considered to be desirable to give the business world the maximum opportunity to make its own rules unless they clearly run afoul of government policy.

Does it make sense to approach civil and criminal litigation so differently? Might not more study and controlled flexibility in the criminal justice system be desirable? Are there not sociological changes that need to be accommodated by *both* systems?

Particularly in the area of the family, a sociological revolution is taking place. The family has been changing for a number of reasons beyond the scope of this paper. We see this in almost every drug case that passes through the courtroom.²³¹ These changes have impacts in both criminal and civil litigations, particularly in matrimonial cases.²³²

²²⁹ Report of the Chief Administrative Judge of New York Courts for 1993, 37 (1994) (community dispute resolution centers); Henry J. Reske, *Victim-Offender Mediation Catching On*, A.B.A. J., Feb. 1995 at 14; Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247 (1994).

²³⁰ Cf. Joe Sexton, *Talk About Pain and Suffering; Court Street's Personal-Injury Lawyers See a Grim Future*, N.Y. TIMES, Mar. 26, 1995, at A37 (noting that while the Giuliani administration's initiatives on crime are expected to create work for criminal lawyers, the outlook for tort lawyers is grim in light of anticipated tort reform legislation).

²³¹ See, e.g., *United States v. Rose*, 885 F. Supp. 62 (E.D.N.Y. 1995) (recognizing the importance of extended family ties, particularly where "nuclear family" is absent) and sources cited therein.

²³² See, e.g., Kenneth B. Wilensky, *Alternative Dispute Resolution in Matrimonial*

There is a danger that the courts will be complicit in the destruction of the family—this most important building block for social stability. One culprit is the rigidity of the sentencing guidelines. The federal guidelines direct judges not to consider the sex of the defendant in sentencing, and note further that “family ties” are not “ordinarily” relevant in sentencing.²³³ In this time of increasingly fragile social connections and pervasive anomie, “family ties” are almost always relevant.²³⁴ If we can preserve a family unit, while still meeting the goals of incapacitation, rehabilitation and deterrence, then we should do so.

What is needed is more flexibility and creativity in dealing with criminal activity, not less. The open minded analysis of ADR in civil matters needs to be employed in criminal matters where excessive reliance on fixed sentences and long incarcerations has created unnecessary tensions and costs. Devices such as alternatives to prison, treatment as a substitute for prevention, decriminalization with civil administrative penalties, and the use of mediation need to be considered.²³⁵

V. CONCLUSION

The legal profession, and particularly the courts, exist to serve the people. We can resolve many of the tensions in our society more effectively, both by improving court procedures, and by some privatization of dispute resolution.

We cannot forget, however, that in a democracy such as ours, the obligation for making law and for changing substantive balances among members of our society lies ultimately with members of our elected and

Cases, N.Y.L.J., June 7, 1995, at 1; A.B.A. TASK FORCE ON MEDIATION, SECTION OF FAMILY LAW, DIVORCE AND FAMILY MEDIATION, STANDARDS OF PRACTICE (1986); Dan Trigoboff, *More States Adopting Divorce Mediation*, A.B.A. J., Mar. 1995, at 32.

²³³ See U.S.S.G. § 5h1.6 (policy statement).

²³⁴ See, e.g., *Rose*, 885 F. Supp. at 63 (noting importance of sentencing so as not to harm innocent family members, including members of extended family); *United States v. Guiro*, 887 F. Supp. 66, 70 (E.D.N.Y. 1995) (absence of community facility near defendant's home increases difficulty of preserving family ties).

²³⁵ See PROPOSED LONG RANGE PLAN, *supra* note 2. The proposed plan suggests some of these approaches for criminal cases: allocate criminal jurisdiction carefully (offenses against the federal government; with substantial multistate or international aspects; highly sensitive local issues; and leave most criminal cases to the states). *Id.* at 23, 26 (Recommendations 2 and 4); Guidelines should be more sensitive to individual defendants and more amenable to alternatives to incarceration. *Id.* at 56 (Recommendation 32). “More broadly, [the Commission] should adopt guidelines that permit judges to take into account a greater number of offender characteristics and impose more alternatives to incarceration.” *Id.* at 57.

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appointed governmental legal institutions. The power to control the law and justice cannot be permitted to seep out of the hands of the people through privatization.

